REPORTS

OF

CASES

ARGUED AND DETERMINED

IN

The Court of King's Bench.

WITH TABLES OF THE NAMES OF THE CASES AND THE PRINCIPAL MATTERS

BY

GEORGE MAULE and WILLIAM SELWYN, Esqrs.

OF LINCOLN'S INN, BARRISTERS AT LAW.

Sit ergo in jure civili finis hic, legitimæ atque usitatæ in rebus causisque civium æquabilitatis conservatio. CICERO.

VOL. IV.

Containing the Cases of Easter, Trinity, and Michaelmas Terms, in the 56th and 57th Years of George III. 1816.

LONDON:

PRINTED BY A. STRAHAN,

LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY;

FOR J. BUTTERWORTH AND SON, LAW-BOOKSELLERS, 43. FLEET-STREET; AND J. COOKE, ORMOND-QUAY, DUBLIN.

1819

ADVERTISEMENT

TO THE

THIRD EDITION.

NEARLY twenty-six years have elapsed since the first publication of the following cases. In the course of that time many of them have come under the consideration of the different Courts in *Westminster-Hall*, some have been made the foundation of other important cases, and others have been explained or rendered doubtful by contrary decisions. A new edition having been called for, the author would not have considered himself as doing his duty to the profession, had he suffered such edition to come before the public without a reference, at least, to all the subsequent analogous cases. In some instances, where many cases had occurred, a bare reference did not appear to be sufficient, and therefore in such cases the notes have necessarily extended to considerable length, forming, as it were, a short treatise on the particular point originally determined.

The research necessary to bring all the cases together requiring more time than could be spared from other engagements, the author has been obliged to avail himself of the assistance of a friend, and he should deem himself guilty of the greatest injustice to that friend (*Wm. Shutt*, Esq. of the *Middle Temple*), did he not acknowledge that to him the public is indebted for most of the references, and some of the notes contained in the present edition. The notes having much enlarged the work, it was found impossible to preserve the paging as in the first edition; but to render it as useful as possible to those who shall have occasion to refer to it from any other book wherein the first edition has been cited, a reference has been given to the pages of that edition in the margin of the present; and when references have been made from one part of the book to another, such references will be found to correspond with the original paging.

Michaelmas Term, 1819.

NAMES

OF THE

CASES REPORTED.

Ganer

G.

H.

J.

K.

L.

Lee

Rex

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A

TABLE

OF THE

CASES REPORTED

IN THE FOURTH VOLUME.

*** The Cases printed in *Italics*, are from *MS.* Notes.

A.

B.

C.

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KING *v.* WILLIAMS.

Friday, January 23.

To debt on simple contract, the defendant pleaded "nil debet per legem," and applied to the Court to assign the necessary number of compurgators to wage his law, but the Court refused to interfere.

THIS was an action of debt on simple contract. Plea, nil debet per legem, and issue thereon. A day having been fixed by the Master for the defendant to appear in court with his compurgators, to wage his law, but without mentioning what number he should bring for that purpose,

Langslow now applied to the Court to assign the proper number. The books leave it uncertain what number of compurgators are necessary in this unusual mode of defence. Some say that seven are necessary; and others, that six are sufficient; but the court, in the exercise of its discretion, will assign the least possible number, for the purpose of saving expense to the parties. In *Les Termes de la Ley*, 442, it is said, "Mes quant un gagera son ley, il amesnera ovesque lui 6, 8, or 12 de ses vicines come le court lui assignera de jurer ovesque lui." That book is attributed, by Lord Coke, to *Rastall*, and is spoken of by him, as one of high authority, in the preface to his 10th. Report. [*Bayley*, J. I believe *Blackstone* lays it down that eleven are necessary.] He certainly does (*a*), and cites *Co. Litt.* 295. and the *Year Book*, 33 H. 6. 8. for what is there laid down; but those authorities do not bear him out. In *Fleta*, b. 2. c. 63. the rule seems to be, that the number of the compurgators shall be double the number of the secta produced by the plaintiff; and in the *Year Book*, 33 H. 6. 8. it is said, that the defendant "jurabit duodecimâ manu." According to the former doctrine, the number must be fluctuating and uncertain, and the fair construction of the latter expression would be six, and not twelve. In 2 *Ventris*, 171. it is declared, that fewer than eleven are sufficient; and in *Style's Practical Register*, 572, it is said, that

(*a*) 3 Comm. 343.

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"he that is to wage the law must do it duodenâ manu, viz. he must bring six compurgators with him; the defendant then swears de fidelitate, the compurgators, de credulitate." It is true that this mode of defence is not very frequently resorted to, but still the Court will recognize it as lawful; for in *Barry* v. *Robinson* (a), when the counsel, in arguing that case, said, that the wager of law had long since fallen into disuse, and that if a man were now to tender his wager of law, the Court would refuse to allow it, and would put him to plead to the action, the reporter says, "this was denied by the Court."

ABBOTT, C. J.—We think this is a case in which the Court ought not to interfere in any way. The defendant must produce the number of compurgators which the law requires, but that he must find out, as he may be advised. We shall make no order upon the subject. He must bring the proper number.

BAYLEY, J.—We do not relieve you from bringing the full number which the law requires; but what that number is, you must find out. We are not to say what the proper number is. If the plaintiff is not satisfied with the number brought, he may object, and then the matter may be further considered.

Langslow submitted that six would be sufficient.

ABBOTT, C. J.—To give any opinion, would be doing something; we propose to do nothing; we leave you to find your own way.

Nothing was taken by the motion. The defendant prepared to bring eleven compurgators; but the action was afterwards abandoned.

(a) 1 N. R. 297.

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HULKE *v.* PICKERING.

Monday, January 26.

The affidavit in support of a rule nisi for entering up judgment on a warrant of attorney more than twenty years old, must shew affirmatively that the debt still remains unsatisfied.

ABRAHAM having obtained a rule nisi for entering up judgment on a warrant of attorney more than twenty years old,

F. Pollock now shewed for cause, that the affidavit on which the rule nisi was obtained did not state any circumstances from which the court could infer that the money remained due. The general rule of law, that after an interval of twenty years, payment must be presumed, extends to warrants of attorney as well as to other securities, and therefore, in the absence of any facts to rebut the presumption of payment in the present case, the Court will discharge this rule.

Abraham contrà, insisted that the onus lay on the other side to shew in answer to the application that the money had been paid. No precedent could be found in any of the books of practice, of an affidavit setting out circumstances to shew that a warrant of attorney remained unsatisfied. If it had been satisfied, it was in the power of the opposite party to prove that fact.

ABBOTT, C. J.—The reason for granting a rule nisi to enter up judgment on a warrant of attorney more than twenty years old, is, that the party may have an opportunity of shewing cause for any irregularity in the proceedings, and that he may not be taken by surprise by an immediate execution after the lapse of so great a length of time. It is a rule of practice, founded in convenience, that if a party delays to enter up his judgment so long, it must be presumed that the debt is satisfied, unless the plaintiff lays before the court something to shew the contrary. In a case of this nature, I think there ought to be some reason assigned for the

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delay, and that it should distinctly appear that the debt remains unsatisfied; the plaintiff should, at least, do something to repel the presumption of payment. This is a demand of more than twenty years standing, and I cannot say that the same doctrine of presumption applicable to other securities ought not to prevail in this instance. The affidavit is in the common form. It does not import that the money is now due, and therefore, after so long an interval, the common form of affidavit is insufficient.

HOLROYD, (a) J.—The object of granting a rule nisi would be defeated if the affidavit in this case were deemed sufficient. Where a warrant of attorney is more than twenty years old, that shews something extraordinary and out of the usual course, and therefore it is necessary that the plaintiff should depart from the common form, and explain the reason of his delay. It lies upon the plaintiff to shew affirmatively that the debt is still due, in order to rebut the legal presumption of payment.

BEST, J. concurred.

The COURT, however, gave the plaintiff leave to amend his affidavit, with directions that it be shewn to the other side, and a proper affidavit being afterwards made, the

Rule was made absolute.

(a) *Bayley*, J. was absent.
(b) See Tidd, 578. 2 Archbold, 16. Tidd's Forms, 153.

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LACY and WILTON *v.* M'NEILE, DICKSON, MONTGOMERY, and PIZEY.

Monday, January 26.

A. is indebted to B. and Co. for goods sold, and upon being released from his liability, assigns to the latter debt which is due to him from C. and Co.; notice of the assignment is given to a partner in the house of C. and Co. who *by parol*, promises in the name of the firm to pay the debt to B. and Co. out of the partnership funds:—Held in an action by B. and Co. against C. and Co. for money had and received, first, that the promise was not within the statute of frauds; and second, that a promise by one partner was sufficient to bind all, although, as to some of the members, the partnership had been dissolved before the promise was given.

ASSUMPSIT for money had and received. Plea, non assumpsit, and issue thereon. At the trial before *Abbott*, C. J. at the *London* adjourned sittings after last Term, the facts were these:—The plaintiffs were merchants in *London*, carrying on business under the firm of *Lacy* and *Wilton*. The defendants and one *Price*, were also merchants, carrying on business in *London*, under the firm of *J. M'Neile* and Co. at *Buenos Ayres* under the firm of *M'Neile, Dickson*, and Co., and at *Chili* under the firm of *M'Neile, Price*, and Co. *Price* and the present defendants continued partners in all the three firms, up to the 30th June, 1821, when the partnership was dissolved, as to the defendant *M'Neile* only. The defendant *Pizey* always resided in *London* and conducted the partnership business there. In the year 1817, the plaintiffs supplied a Mr. *Goodfellow* with goods, for the amount of which, he accepted two bills, drawn by them upon him, to their own order, dated 10th October, 1817, one at nine and the other at twelve months' date, upon each of which the following memorandum was indorsed. "Note. The payment of this bill is secured to *J. G. Lacy* and *D. Wilton*, by an assignment from *J. Goodfellow* of a debt due to him from Messrs. *J. M'Neile* and Co., dated 30th *March*, 1820." These bills being dishonoured, an action was commenced by the plaintiffs against *Goodfellow* in *Hilary* Term, 1819, in which he was arrested and put in bail. In *March*, 1820, *Goodfellow* executed a deed of assignment to the plaintiffs, of all the money due to him from the defendants, and a warrant of attorney, upon which judgment was afterwards entered up, and the action against him was discontinued, and his bail discharged. On the 12th *April*, 1820, a written notice of the assignment was sent to the defendant *Pizey*, in *London*, and shortly afterwards he saw the plaintiff's at-

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torney, when he made no objection to it, but said, "That another person had given prior notice of 500*l.* which he must pay first, but they would pay the plaintiffs after the 500*l.* as soon as they received the money." In *December*, 1821, another interview took place between the same parties, when the defendant *Pizey* said, "the people of *Chili* did not regard the laws of *England*, and that if their house there had not paid the money to *Goodfellow*, he would pay it to the plaintiffs; that their house had made a shipment, and if it had turned out well, he thought there would have been enough to pay 1100*l.* to his house, and 500*l.* over, to divide between the plaintiffs and the other; the rest was paid to *Goodfellow*: a notice to *Chili* would have made no difference." Eventually the money was not paid, and the present action was brought. For the defendants two objections were taken, first, that the promise being to pay the debt of another ought to have been in writing, to take the case out of the statute of frauds; and second, that this not being a transaction in the ordinary course of business, the promise of one partner would not bind the other partners, and, therefore, the action should have been brought against the defendant *Pizey* alone. The learned Judge, however, overruled both objections, and the plaintiffs had a verdict, with liberty to the defendants to move to enter a nonsuit.

Copley, A. G., now moved accordingly, and renewed both objections. First, the promise by the defendants to pay the plaintiffs being by parol, and being to pay the debt of a third person, is within the statute of frauds, and cannot therefore sustain the present action. *Goodfellow*'s debt to the plaintiffs was never extinguished, the defendant's promise consequently was merely collateral, and ought to have been in writing. [*Bayley*, J. Can this case be distinguished from *Israel* v. *Douglas*? (*a*) There the defendants were indebted to *Delvalle*, and he was indebted to the plaintiff, to

(*a*) 1 H. Bl. 239.

whom he gave an order upon the defendants to pay what they owed to him, *Delvalle*. The defendants accepted that order, but afterwards refused to pay the money, and the plaintiff brought an action against them and recovered; and upon a motion for a new trial, Lord *Loughborough* said, "This debt (which was due from the defendants to *Delvalle*) is, with the consent of the parties, assigned to the plaintiff. The defendant has due notice of it, and assents; by which assent, he becomes, with his partner, liable to the plaintiff." I confess that case appears to me to govern the present upon both the objections raised. I remember a case before Lord *Kenyon*, in which a similar ruling took place. *Abbott*, C. J. Do not *Pizey*'s words amount to an absolute personal promise on the part of himself and his partners to pay the plaintiffs out of their own funds? It appears to me that they do.] The plaintiffs never released *Goodfellow* from his debt to them; his debt to them was an existing debt; and therefore, whatever promise the defendants made was wholly collateral, and is within the statute. [*Abbott*, C. J. The defendant's debt to *Goodfellow* was assigned to the plaintiffs, and *Goodfellow* discharged from all liability to them; then surely the old debt by him was extinguished, and a new one by the defendants created.] Then, secondly, though generally speaking, one partner may by his own undertaking or promise bind another, still he can do so only in ordinary partnership transactions. This action, therefore, cannot be maintained against the defendant *M'Neile*, because when once the partnership was dissolved as to him, *Pizey*'s admission of the receipt of funds, and his promise to pay them over to the plaintiffs, cannot be evidence against him, nor indeed, from the peculiar nature of the transaction, against any of the other partners. *Petherick* v. *Turner* (*a*) is a direct authority for this position. [*Abbott*, C. J. Can it be said that there was a dissolution of partnership here, in the proper sense of the word? *Bayley*, J. *Petherick* v.

(*a*) Cited in *Wood* v. *Braddick*, 1 Taunt. 101.

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Turner certainly supports the present argument, but *Wood* v. *Braddick*, in which it is cited, is directly the other way; for it was there held that "an admission made by one of two partners, after the dissolution of the partnership, concerning joint contracts that took place during the partnership, is competent evidence to charge the other partner." Lord *Mansfield's* reasoning upon the subject in that case is perfectly conclusive.] Still, if the evidence was admissible, the promise itself was not sufficient to bind the other partners, being made without their knowledge or consent, and in a transaction quite foreign to the ordinary course and purposes of their trade.

PER CURIAM.—The cases cited, shew that the undertaking in this case is not within the statute of frauds, and that the admission of *Pizey* was competent evidence to charge the other defendants. It is equally clear that the promise to pay, being made by one partner for and in the name of the rest, coupled with the declaration "that a notice to *Chili* (that is, to the other partners) would have made no difference," is a perfectly good promise to bind the other partners. There is, therefore, no pretence for disturbing this verdict.

Rule refused.

The REV. T. JEE, Clerk, *v.* THURLOW.

Tuesday, January 27.

DECLARATION in debt on bond, in the penal sum of 500*l.* Plea craved oyer of and set out the bond and condition, which recited that some unhappy differences having taken place between the defendant and his wife, they had by a certain indenture, (bearing even date with the bond,) to which defendant and his wife were the first and second parties respectively, and the plaintiff, as her trustee of the third part, mutually agreed to live separate and apart, and that the defendant had thereby covenanted to pay his wife, during so much of the term of her natural life as he should live, an annuity of 80*l.* payable quarterly, subject, however, to the deduction of any sums which the defendant should pay in discharge of debts subsequently contracted by her. The indenture was then set out at length, from which it appeared, that the defendant and his wife had mutually determined to live separate from each other, and had agreed that all their children should from thenceforth remain under the entire management of the defendant; and that he had proposed to allow her an annuity of 80*l.* during so much of her life as he should live; and it was witnessed, that in consideration of the premises, defendant covenanted that his wife should live apart from him, and that he would not at any time thereafter sue her, in the Ecclesiastical or any other Court, for the restitution of conjugal rights; that he would pay her the said annuity quarterly; and that the wife had thereby agreed to accept the same annuity in full satisfaction of her support and maintenance, and of all alimony whatsoever during her coverture, and to allow the defendant to have the entire control of all their children. Provided

By indenture, to which husband and wife were the first and second, and a trustee for the latter, the third parties respectively, reciting that unhappy differences had arisen between the husband and wife, and that they had mutually agreed to live separate, the husband covenanted to pay an annuity of 80*l.* during so much of the wife's life as she should live, in full satisfaction of her support and maintenance, and of all alimony whatsoever, and that he would not at any time thereafter sue her for the restitution of conjugal rights; and the trustee covenanted that the wife should release her husband's real and personal estate from all claims for jointure, dower, or thirds, and that he would indemnify the husband for debts incurred by the wife after separation:—Held that such indenture was valid in law, and that a plea by the husband, "that the wife had instituted a suit in the Ecclesiastical Court for restitution of conjugal rights, in which cause he had put in an allegation and certain exhibits, charging her with adultery, and that a decree of divorce from bed and board was thereupon pronounced by that court," was no answer, to an action by the trustee for arrears of the annuity.

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always, and it was expressly agreed, that in case the defendant should at any time afterwards pay any debts contracted by his wife during the coverture, it should be lawful for him to deduct the same out of the said annuity; and in consideration of the premises the plaintiff covenanted on behalf of the wife, that she should release the defendant from any claim which she might have upon his real or personal estate, for jointure, dower, or thirds; and plaintiff further covenanted to indemnify the defendant from all debts which should be thenceforth contracted by his wife. Averment that from the time of making the bond and indenture mentioned respectively, until 6th *October*, 1822, defendant had paid the said annuity, but before the quarterly payment which became due on the 6th *January*, 1823, the said *Maria Thurlow*, to wit, on &c. at &c. instituted in the Consistory Court of the Lord Bishop of *London*, a cause against defendant for the restitution of conjugal rights, in which cause defendant caused to be given in and admitted in the said Consistory Court, a certain allegation, and certain exhibits on his behalf, charging his wife with certain acts of adultery alleged to have been by her committed with one J. E. F.; and such proceedings were thereupon had in the said Consistory Court, that afterwards, to wit, on &c. at &c. by a certain decree of the said Court then and there made in the said cause, the defendant and his wife were divorced from bed and board, and mutual cohabitation, by reason of the said acts of adultery by her committed. Defendant then averred performance of the covenants entered into by him, and concluded with a verification. Demurrer and joinder in demurrer. Suggestion of breach, the non-payment of the quarter's annuity due 6th *January*, 1823.

Chitty, in support of the demurrer. The defendant's plea is no answer to this action. The substantial question raised on this record, is whether the indenture set out is good in law, and upon considering the terms of the instrument itself, there seems no doubt of its validity. The an-

nuity thereby granted, is in the nature of a jointure, and is payable absolutely, whether the parties continue to live separate or not. It may be urged that the claim arising out of it is analogous to a demand of dower, and consequently that the wife having sued for a restitution of conjugal rights, the decree of the Ecclesiastical Court against her for adultery has annulled her title to the annuity, as it would her right to dower. But, in the first place, dower is forfeited for adultery, by the express language of an act of parliament, *Stat. Westm.* 2. c. 34., and in the second, such a decree is no bar to a suit at common law. The rules of evidence in the two courts are widely different, for in a court of common law, a plea of adultery would be no answer to an action upon a deed like the present, nor to an action for jointure, *Sidney* v. *Sidney* (*a*). That was an action brought by the wife in her own person, but that makes no difference; the principle is the same, and is equally applicable to the present case; *Field* v. *Serres* (*b*). The more serious objection, however, and that upon which the defendant will probably rely, is, that the deed itself is void in law, according to the case of *Titley* v. *Durand* (*c*). That case is, however, distinguishable from this, and besides being the only one which in any degree supports the objection, is opposed by a current of authorities in which the doctrine has been upheld, that deeds of this nature are good in law, and will support an action. Indeed, the only argument which can be adduced on the other side against deeds of this description is, that they are opposed to public policy, and therefore ought not to be upheld. But that argument will not now be allowed to prevail against a series of solemn decisions, both at law and equity. In *Rodney* v. *Chambers*, (*d*) this Court decided that the husband's covenant with his wife's trustees to pay her an annuity as separate maintenance in the event of a separation in future taking place between

(*a*) 3 P. Wms. 269. 1 Atk. 276. S. C. on Appeal.
(*b*) 1 New Rep. 121 (*c*) 7 Price, 577. (*d*) 2 East, 283.

them, with the approbation of the trustees, was a legal and valid covenant; and the judges were unanimously of opinion that the trustees were entitled to recover in an action against the husband, the arrears which had accrued on the annuity after separation. So in *Chambers* v. *Caulfield*, (*a*) where the husband covenanted "that in case of future differences, and his wife should at any time hereafter find it necessary to live separate and apart from him, he would permit her to leave him, provided the separation took place with the approbation of the trustees," the deed was considered by Lord *Ellenborough*, C. J. as legal and binding; and *Lawrence*, J. referring to the case of *Rodney* v. *Chambers*, (*b*) observed that "in that case, there was an averment that the separation was with the consent of the trustees. He thought that there was nothing illegal in the parties agreeing to refer the question, what was a good cause of separation, to a domestic forum, instead of applying to the Ecclesiastical Court for a divorce and alimony. The Court, therefore, only decided in that case, that a covenant for separation and separate maintenance with the consent of the trustees was good; not that a covenant was good generally that a wife might separate herself from her husband whenever she pleased, for that would be to make the husband tenant at will to the wife of his marital rights." In *St. John* v. *St. John*, (*c*) Lord *Eldon* enlarges upon the perplexity of this branch of the law, and intimates his opinion that these decisions are opposed to public policy; but he nevertheless confirms them, for he concludes with these emphatic words: "If this were res integra, untouched by dictum or decision, I would not have permitted such a covenant to be the foundation of an action or a suit in this Court. But if dicta have followed dicta, or decision has followed decision, to the extent of settling the law, I cannot, upon any doubt of mine, as to what ought originally to have been the decision, shake what is the settled law upon the subject."

(*a*) 6 East, 244. (*b*) 2 East, 283. (*c*) 11 Ves. jun. 529.

ment. [*Best*, J. In Rex v. *Listor* (*a*), it was decided that where there are articles of separation between husband and wife, if the husband afterwards confine the wife, she may have a habeas corpus, and be set at liberty. Surely that is a recognition of the legality of a separation, and the separation can be legal only by mutual agreement. *Abbott*, C. J. The legality of these instruments has been recognized in a series of cases spread over an interval of more than a century; can we now, for the first time, presume to shake a principle so established?] It has been shaken already by the decision in *Titley* v. *Durand* (*b*). [*Abbott*, C. J. No, not the general principle; that was a case by itself, and distinguishable from all that preceded it. The ground of the opinion given by my Lord Chief Justice *Dallas* and myself there, was, that the agreement was for a future separation to be adopted at the sole pleasure of the wife, the parties being, at the time of making the ageement, living together and in amity. We shall not interfere with that decision by supporting the deed now in question, and how can we do otherwise than support it? We must be governed by the decisions of upwards of a century; we cannot presume at one sweep to overturn them all; no power but that of the legislature can be equal to such an act.] If an agreement for a future separation is void, a present or retrospective agreement ought to be void also; they are all equally offensive to public morality, and to public policy, and should all be placed upon the same footing.

Chitty, in reply, was stopt by the court.

Abbott, C. J.—For the reasons already intimated by the court, and which I think it unnecessary to repeat, we cannot now hold this deed to be void in law; it only remains to

(*a*) 8 G. 1. 1 Stra. 477. 13 East, 173, in notis. See also 1 Burr. 542; 5 T. R. 91; and Rep. temp. Hardw. 152, in notis, and 1 Vern. 53.
(*b*) 7 Price, 577.

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consider whether the plea pleaded by this defendant is an answer to the action. I am of opinion that it is not. It has been decided, that the plea of adultery is no answer to an action of this kind, *Sidney* v. *Sidney* (a), and we must act upon that decision. The covenant here is absolute and unqualified, and the covenantor must be bound by it. He might have qualified his liability by imposing the condition of chastity; but he has not done so. I am of opinion, therefore, that the plaintiff is entitled to judgment on the demurrer.

BAYLEY, J.—A system of jurisprudence so long acted upon as that which has held deeds of separation, made with the approbation of trustees, and not prospective in their nature, as valid and binding instruments, cannot be overturned upon a vague notion that it is inconsistent with public policy. This Court, after the numerous authorities which have declared such deeds legal, is not competent even to inquire whether they are so or not; the House of Lords is the proper tribunal for such an inquiry, and thither this case may be carried for further discussion on that point. It appears to me, however, that the argument respecting public policy is not so universal in its operation as has been suggested. I can imagine cases where it may, unhappily, be beneficial to the interests of society that a mother should be separated from her children, and maintained apart by her husband; and I cannot but think that where the wife has been guilty of gross misconduct, public policy is best promoted by allowing her a separate maintenance, for two reasons; first, that the children may be rescued from the danger of an evil example; and second, that the mother may not by necessity be driven to a repetition of crime. But the question is not res integra; we have no power to decide it; it has been decided for us by competent authorities, and to their decision we must bow. Upon the other point, I am clearly of opinion that the plea in this case is

(a) 3 P. Wms. 269; 1 Atk. 276. S. C. on appeal.

no answer to the action. It does not aver that adultery has been committed since the execution of the deed, and though it does aver that restitution of conjugal rights was refused by the Ecclesiastical Court, upon the ground of adultery by the wife; still, as the mere commission of adultery, at some time or other, would be no bar to this claim, so the decision of the Ecclesiastical Court is no such bar. We cannot act upon such a decision, because it is obtained by modes of inquiry and rules of evidence very different from those which prevail in this Court. Then, as the adultery is not proved, we cannot assume it, and the plea becomes a nullity. The plaintiff, therefore, is entitled to judgment.

HOLROYD, J.—It has been argued, that this agreement is prospective, and for that reason void, but I cannot assent to that proposition. It is evidently made upon a separation then fully determined upon, though not yet actually commenced, and therefore it is within the cases which have held deeds of separation to be legal instruments. The covenants fully support this deed, for one of them is, that the wife shall release her dower, which has been held to be a good consideration for a separate maintenance, *Worrall* v. *Jacob* (a). It is clear that adultery is no release of a covenant to settle a jointure upon a wife, *Sidney* v. *Sidney* (b), and *Seagrave* v. *Seagrave* (c), nor can it therefore be a bar to her title to this annuity, if the deed be valid. Then, has she forfeited her title by suing for restitution of conjugal rights? I think not. The husband's covenant is absolute; it is for life; and the case does not fall within that class which may be termed reconciliation cases; for an unsuccessful attempt to enforce a supposed right by legal means can hardly be considered as an offer of reconciliation. Upon the other point, I fully concur that we cannot run counter to the stream of authorities which have held a deed like the present binding; and therefore, upon every view of the case, I am of opinion that this action is maintainable.

(a) 3 Meriv. 256. (b) 3 P. Wms. 269. 277. in notis. (c) 13 Ves. 443.

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BEST, J.—It has been attempted to support this plea by saying that the wife, by attempting a reconciliation, has vacated the deed, and *Bateman* v. *Ross* (*a*) has been cited as in point. But that case does not apply to the present, for there the parties were actually reconciled, and came together again; here no such result ensued; the husband opposed the reconciliation, and prevailed, consequently the deed enured as much as if the attempt had never been made. Upon the general question of the legality of the deed, I entertain no doubt. Public policy must not prevail against settled law; nor can we venture to overturn those decisions which have been confirmed, on appeal, by the highest tribunal of the land. Whatever may be the policy or impolicy of the law, it is settled that this description of deed is a valid and binding instrument, and upon that settled law we must act.

Judgment for the plaintiff on demurrer.

(*a*) 1 Dow. P.C. 245.

Wednesday, January 28.

HAWES and Another *v.* WATSON and Another.

On the 26th *September*, A. sold by contract to B. 100 casks of tallow, then lying at a wharf, and on the same day gave him a written order to the wharfingers "to weigh, deliver, transfer, and rehouse" the same. Next day, B. who had previously entered into a contract with C. and Co. for the sale of 300 casks of tallow, in part fulfilment of that contract, obtained from the wharfingers, and sent to C. and Co. the following acknowledgment: "Messrs. C. and Co. we have this day transferred to your account (by virtue of an order from B.) 100 casks tallow, &c. with charges from 10th *October*." Upon the receipt of this, C. and Co. paid B. the full amount of the tallow. Shortly afterwards, the wharfingers delivered twenty-one of the casks to the order of C. and Co. On the 11th *October*, B. stopped payment, and on the 14th, A. the original vendor, sent notice to the wharfingers not to deliver the remainder of the tallow to B. or his order; and though the tallow had not been weighed, Held in trover by C. and Co. against the wharfingers, that after their acknowledgment that they had transferred the tallow to their account, they were estopped, and could not set up in defence a right in A. to stop in transitu.

TROVER for 79 casks of tallow. Plea, Not Guilty, and issue thereon. At the trial before *Abbott*, C.J. at the *London* adjourned Sittings after last Term, the facts proved on the part of the plaintiffs were these. On the 25th *Sep-*

tember, 1823, the plaintiffs bought of Messrs. *Moberly* and *Bell*, by contract, 300 casks of tallow, at 40*s*. per cwt. On the 27th *September*, in part fulfilment of the contract, Messrs. *Moberly* and *Bell* sent to the plaintiffs a transfer note signed by the defendants, who were wharfingers, in these words: "Messrs. J. and B. *Hawes*, we have this day transferred to your account (by virtue of an order from Messrs. *Moberly* and *Bell*) 100 casks tallow, ex *Matilda*, with charges from *October* 10th, 1823. *H.* and *M.* 100 casks." Upon receipt of this, the plaintiffs gave Messrs. *Moberly* and *Bell* their acceptance for 2880*l.*, the amount of the tallow, which was paid when due, and shortly afterwards re-sold twenty-one casks to a third party, which the defendants delivered in obedience to their order so to do. On the 11th *October*, Messrs. *Moberly* and *Bell* stopped payment, and on the 14th *October*, Messrs. *Raikes* and *Co.* the original vendors, sent notice to the defendants not to deliver the remainder of the tallow to Messrs. *Moberly* and *Bell*, or their order. The defendants in consequence refused to deliver the remainder of the tallow to the plaintiffs, on their demand, and the present action was brought. On the part of the defendants, it appeared, that on the 26th *September*, Messrs. *Moberly* and *Bell* had bought these same 100 casks of tallow of Messrs. *Raikes* and *Co.* landed out of the *Matilda*, lying at *Watson's* wharf, at 41*s*. per cwt. to be paid for in cash, allowing two and a half per cent. discount, and fourteen days for delivery; and on that day, Messrs. *Raikes* and Co. gave them a written order upon the defendants "to weigh, deliver, transfer, or re-house" the tallow. Messrs. *Moberly* and *Bell* never paid Messrs. *Raikes* and Co. for the tallow, nor was it ever weighed after the delivery of that order. It was contended for the defendants, that the tallow not having been weighed, the delivery of it to Messrs. *Moberly* and *Bell* had never been completed, and consequently that Messrs. *Raikes* and Co. had a right to stop it in transitu in the hands of the defendants, who were bound to retain it as their agents. The

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learned Judge, however, was of opinion that the defendants having by their transfer note acknowledged that they held the tallow as the property of the plaintiffs, were estopped from afterwards disputing their title, and directed the jury to find their verdict for the plaintiffs.

Copley, A. G., now moved for a new trial, on the ground of misdirection. This case falls within the rule of law laid down in *Hanson* v. *Meyer* (a). The tallow was sold at a certain price per cwt. and therefore the act of weighing was necessary, in order to complete the transfer. Then, until it was all weighed, *Raikes*, the original vendor, clearly had a right to stop it in transitu, and if he had that right, the defendants, who were his agents and representatives, had it also. What was said by Lord *Ellenborough* in *Hanson* v. *Meyer*, is strictly applicable to the defendants here: "The order stated in the case, from the defendant to the *Bull* porters, his agents, is *to weigh and deliver all his starch*. Till it was *weighed*, they, as his agents, were not authorized to deliver it." [*Bayley*, J. There the goods remained during the whole time in the name of the seller, and he paid the warehouse rent.] In this case the seller paid the warehouse rent for the tallow during a part of the time. [*Bayley*, J. But it did not continue in his name; on the contrary, there is an express acknowledgment by the defendants that it belonged to the plaintiffs. *Abbott*, C. J. Here *Raikes*'s delivery order is, "to weigh, deliver, transfer, or rehouse" to *Moberly* and *Bell*; then there is a similar order from *Moberly* and *Bell* to the defendants; and there is the acknowledgment of the defendants to the plaintiffs, stating, "we have this day transferred to your account, by virtue of an order from Messrs. *Moberly* and *Bell*, 100 casks tallow, ex *Matilda*, with charges from October 10th, 1823.] The case of *Shepley* v. *Davis* (b) is a direct authority for the defendants in this case. There the plaintiff having hemp at his wharfinger's, sold a part of it, and gave the wharfinger an order to weigh and deliver, which he en-

(a) 6 East, 614. (b) 5 Taunt. 617.

tered, and transferred the hemp in his books. Before the hemp was weighed, the buyer became insolvent; but it was held, that, as the weighing was a condition precedent to the delivery, the vendor was entitled to recover the hemp in an action of trover against the wharfinger. [*Best*, J. In that case, there was no acknowledgment by the defendants that they held the goods on account of the buyer; here there is; besides, there the original seller was the plaintiff, whereas here the plaintiff is an innocent and bonâ fide purchaser. *Bayley*, J. There are two material distinctions between that case and this; first, the contract there was confined to the original vendor and vendee, and the action was brought by the vendor, who had a right to rescind the contract; and second, the property was never transferred to any third person, nor did the wharfingers acknowledge that they held it on account of any third person.] It seems clear, from both these cases, that *Raikes* and Co. the original vendors, had a right to stop the delivery of the goods until they were paid, and if that be so, it follows that the defendants, as their wharfingers, were justified in retaining them at their order, and on their account. [*Bayley*, J. The contract here was complete between the plaintiffs and *Moberly* and *Bell*; they had paid *Moberly* and *Bell* the price of the goods; the defendants had held the goods as the property of *Moberly* and *Bell*, and therefore they cannot afterwards turn round and repudiate that act. *Best*, J. Upon the point of the transfer note given by the defendants to the plaintiffs, *Stonard* v. *Dunkin* (a) seems decisive of this case. Suppose the goods had been burnt after that transfer note was given, could it be contended that *Raikes* and Co. would have been the sufferers? I apprehend clearly not.] The contract between *Raikes* and Co. and *Moberly* and *Bell* was not complete when the latter sold to the plaintiffs; the former, therefore, were at liberty to rescind it, and to stop the goods as against all the world. Then the defendants were at liberty to hold the goods, when so stopped, on ac-

(a) 2 Camp. 344.

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count of *Raikes* and Co. A contrary decision must work the greatest hardship upon the wharfingers, and that most undeservedly, for they have acted bonâ fide for the interest of their employers. [*Bayley*, J. *Raikes* and Co. might have rescinded the contract, and stopped the goods as against *Moberly* and *Bell*, the original vendees; but their right so to do was gone when the interest of a third person intervened. That was decided in *Stoveld* v. *Hughes* (*a*), and other cases which might be mentioned, and that distinguishes this case from both those cited.] Still if the goods are resold by the original vendee before they are properly his, while they are yet actually in transitu, which is the fact here, that cannot bar the right of the original vendor to stop them.

ABBOTT, C. J.—I am of opinion now, as I was at the trial, that after a party has paid his money upon a transfer note, such as that given in evidence on the present occasion, we should be enabling the defendants to do that which I cannot suppose they desire to do, namely, to cause an innocent man to lose his money, if we were not to hold that these plaintiffs are entitled to recover; and I cannot help thinking, that to treat this as a case of stoppage in transitu, would have the effect of putting a stop to a very large portion of the commerce of the city of *London*. It seems to me, therefore, that there is no ground for disturbing the verdict.

BAYLEY, J.—I am of the same opinion. This appears to me to be perfectly different from the ordinary case of vendor and vendee. In the case of vendor and vendee, the justice is that the vendee shall not have the goods, unless he pays the price; and it is just and honest that, if the vendee cannot pay the price, the vendor shall have his goods back; but if the question arises, not between the original vendor and the original vendee, but between the original

(*a*) 14 East, 308. Vide 6 East, 19 et seq. in notis.

vendor and a purchaser from the vendee, that purchaser having paid the full price for the goods; then what is the justice, and honesty, and equity of the case? The honesty is, that the vendee who has paid the price, shall be entitled to have the possession of the goods. When *Raikes* and Co. signed a delivery order "to transfer, weigh, and deliver," that, according to the settled course and usage of trade, enabled *Moberly* and *Bell* to resell the goods; and there are many cases, one of which I have already mentioned, which decide, that if the first vendor does any act which can be considered as sanctioning the sale by his vendee, that destroys all right to stop in transitu.

HOLROYD, J.—I think the transfer note given by the defendants to the plaintiffs makes an end of the present question. After that, the property in the goods was in the plaintiffs, and they were held by the defendants as the property of the plaintiffs, for which the plaintiffs were to be liable to the charges from the day mentioned in the transfer note, that is, from the 10th of *October*. This case is very different from that of *Hanson* v. *Meyer*. In that case, there was a sale of a large quantity of starch at a fixed price; the order was to weigh and deliver a part, and that having been delivered, but not the residue, the great question before the Court was, whether the weighing and delivery of a part was or was not, in point of law, a transfer of the property in the whole. The Court held, that it was not, and rightly so held; the price could not be ascertained, until the whole was weighed; the delivery of a part, therefore, was not a delivery of the whole; part being weighed and delivered, the order was complied with pro tanto, and the property in the residue remained surcharged until something further was done. It was not a delivery of a part for the whole, nor did the consequence follow by operation of law that it was a delivery of the whole, so as to deprive the vendor of his right to stop in transitu. But here, on receipt of the order to transfer, weigh, and deliver, the wharfingers sent an acknow-

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ledgment to the persons who had bought the goods and paid for them, that they had transferred them to their account, and those persons were made subject to charges from a certain period. I think, therefore, that they held them as the property of the plaintiffs, although there was not an actual weighing of them; that they were in the possession of the plaintiffs by means of the defendants, the wharfingers, they having given them the note stating that they were transferred to them in their books; and that the plaintiffs consequently were entitled to recover them.

BEST, J.—I think, with my brother *Holroyd*, that the paper which was given in evidence puts an end to the question, if there was any question, in this case; but it is also set at rest by a case which is not merely a nisi prius decision, but which also received the sanction of the whole Court; I mean that of *Harman* v. *Anderson* (a), which is precisely the same as the present. Lord *Ellenborough*, in that case, when sitting at nisi prius, said, "the goods having been transferred into the name of the purchaser, it would shake the established principles still to allow a stoppage in transitu; from the moment the defendants became trustees for the purchaser, there was an executed delivery, as much as if the goods had been delivered into his own hands. The payment of rent in these cases is a circumstance to show on whose account the goods are held; but it is immaterial here; the transfer in the books being in itself decisive. I am clearly of opinion, that the assignees are entitled to recover." In the ensuing Term, the Attorney-General, afterwards Lord Chief Justice *Gibbs*, expressed his acquiescence in the direction of the judge at nisi prius, but moved to reduce the damages, on an affidavit stating that, as to one parcel of the butters, no transfer had been made in the defendant's books to the bankrupt before the bankruptcy, and that, as to that, the right of stopping in transitu therefore still subsisted when the vendor interfered.

(a) 2 Camp. 243.

That, therefore, cannot be considered as a mere nisi prius decision; it is one which received the sanction of one of the most distinguished lawyers in *Westminster* Hall, when moving for a new trial, and which was sanctioned by the whole Court. But it seems to me, if we consider the principle on which the right of stoppage in transitu is founded, it cannot be extended to such a case as this; if it could, it would destroy that commerce which is now carried on through the instrumentality of dock orders. *The vendee has a right to the goods the moment* the contract is made and executed; but there exists in the vendor an equitable right which he may exercise at any time before the goods actually pass into the possession of the vendee, provided the exercise of that right does not disturb the rights of third persons. Now it appears to me impossible that it can be exercised in this case, without disturbing the rights of third persons, for the goods have not only been transferred in the books of the wharfingers, but there has been an acknowledgment by them that they hold them for the purchaser. It is said there has been no change of property here; if there has not, I do not see how there can be, until the tallow is actually melted down, and converted into candles. If that were so, then till the very time when it is brought into use, though it may have passed through a hundred hands, and been paid for by all, still, if it has never been weighed, the vendor, if he has not been fully paid, has a right to stop it in transitu. I think we should overturn an established principle, and a necessarily just principle, if we held that he had such a right in a case like this. He cannot exercise that right, except where the rights of third persons are not disturbed. It was originally an equitable right, and was so considered, and it is still, and ought to be considered as an equitable principle.

Rule refused.

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Where the sheriff, to avoid an attachment for not bringing in the body, gave the plaintiff notice of putting in bail, but in the notice he omitted to state the names of the proposed bail: Held that the notice could not be treated as a nullity entitling the plaintiff to move for an attachment.

Pugh v. Emery.

D. F. JONES moved for an attachment against the Sheriff of *Middlesex* for not bringing in the body of the defendant, pursuant to a rule obtained for that purpose, upon an affidavit stating that the sheriff had given notice of putting in bail, but that the notice did not set forth the names of the bail, or that they had been perfected. This he contended was an irregularity, and therefore the notice of bail might be treated as a nullity, and the plaintiff was entitled to his remedy against the sheriff, the same as if no notice of bail had been given.

Bayley, J. (a)—The sheriff certainly has not been quite correct in the form of his proceeding, but I think it would be rather too much to grant an attachment against him, under such circumstances.

Rule refused.

(a) The only judge in court.

Thursday, January 29.

Where A. and B. had dissolved partnership, and two days afterwards A. drew a bill in the names of the partnership, which was accepted and paid by C. without consideration; and C. afterwards brought assumpsit against A. and B. for money lent: Held that A. who had become bankrupt and obtained his certificate was a competent witness for B. to prove that the acceptance was for his (A.'s) own sole accommodation, inasmuch as B. was merely a surety within the meaning of the 49 G. 3. c. 121. s. 8. and might have proved under A.'s commission.

Moody v. King and Porter.

ASSUMPSIT for money lent, with the other money counts. Plea, by the defendant *King*, non assumpsit, and issue thereon; by the defendant *Porter*; bankruptcy and certificate, and a nolle prosequi entered as to him. At the trial, before *Abbott*, C. J. at the adjourned *Middlesex* sittings after last term, the case was this:—On 16th *July*, 1821, plaintiff accepted an accommodation bill for 48*l.* 17*s.* 3*d.* drawn in the names of the defendants,

which he afterwards paid on their account. On the 14th of the same month the defendants executed an agreement for the dissolution of their partnership, by which the partnership was to be considered as dissolved from the 29th of *May* preceding, and the defendant *King*, in consideration of a sum of money, assigned his share of the partnership effects to the defendant *Porter*, who covenanted to indemnify him against all partnership debts. Notice of the dissolution was not inserted in the *London* Gazette until the 17th *July*. In *February*, 1822, the defendant *Porter* became a bankrupt, and shortly afterwards the plaintiff applied to the defendant *King* for payment of the bill, which he declined. The bill had been paid on the 18th *July* into the banking house of *Lubbock* and Co. where the defendants had kept cash, and was discounted by them. In answer to this case, it was proposed to call the defendant *Porter*, who had obtained his certificate, to prove that before his partnership with the defendant *King* he had frequent accommodation bill transactions with the plaintiff; that on forming the partnership he discontinued them for a time, but afterwards renewed them in his own name; that at the time of executing the deed of dissolution, the 14th *July*, he had a blank acceptance of the plaintiff's in his possession; that the bill in question was drawn either on the 17th, or 18th *July*, on his own account solely, and remained in Messrs. *Lubbocks'* hands till his bankruptcy, when it was taken up by the plaintiff; that when the bill became due, he (*Porter*) called upon Messrs. *Lubbocks* and begged time, which they granted; and that upon the plaintiff's communicating to him that he should apply to the defendant *King* for payment, he told him that "he knew Mr. *King* was not liable, and therefore it was of no use," that conversation taking place about a month only before his bankruptcy. On the part of the plaintiff it was objected that the defendant *Porter* was not a competent witness to prove these facts, on the ground that he had an interest in the result of the cause, because if the plaintiff recovered, he would be liable

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over to *Porter* for contribution. The Chief Justice overruled the objection, and received the evidence, upon which the plaintiff was nonsuited, with leave to move to enter a verdict for him, if the Court should be of opinion that the evidence was improperly admitted.

Scarlett now moved accordingly, and renewed the objection: The defendants were joint debtors to the plaintiff. *King* was not a surety for *Porter*, and therefore his claim upon him could not arise until after the bill was paid. It has been held that where a party lends his name to a bill for the benefit of another, he is surety for the debt of that other, and is within the protection of the 49 Geo. 3. c. 121. s. 8. Exparte *Young*. (a) But this is not like that case. This was a partnership transaction, and consequently, as *King* could not prove under *Porter*'s commission until the bill was paid, the certificate was no bar to his claim. *Porter* therefore remained liable over to *King* for contribution in the event of a verdict against him, and upon that ground his evidence was clearly inadmissible.

Abbott, C. J.—The partnership as between *Porter* and *King* was actually dissolved on the 14th *July*; this bill bears date after that time, and therefore as between *Porter* and *King* it could not be a partnership transaction. If *King* had been obliged to pay the bill he might have had his remedy against *Porter*, but that would be a remedy for the whole sum in the character of surety, because it was not a partnership transaction between them. The argument is founded upon the supposition that as between *King* and *Porter* it was a partnership transaction, which is not the fact. I think that *King* was a surety for *Porter* within the meaning of the statute, and might have proved under the commission; but as he did not prove, his claim is barred by the certificate, and there remains no interest in *Porter* such as to exclude his evidence.

(a) 2 Rose, B. C. 40.

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BAYLEY, J.—Even if it had been made out that *King* and *Porter* were partners at the time of this transaction, still I am quite satisfied that *Porter's* certificate would be a bar to any claim which *King* might have against him for contribution, because the certificate is a complete answer to the claims of everybody.

BEST, J. (a)—I am of opinion that *King* comes precisely within the words of the 49 G. 3. 121. s. 8. as "a surety or person liable for the bankrupt." On that ground the objection might be over-ruled; but independently of the statute, and before the statute, the certificate would have been an answer at law to any claim as between partners.

Rule refused. (b)

(a) Holroyd, J. was sitting in the Bail Court.
(b) Vide 1 East, 48. 2 Camp. 617. 1 Stark. 375. 13 East, 175. 2 Rose, 40.

OPPERMAN v. SMITH and Another.

Thursday January 29.

The stat. 11 G. 2. c. 19 applies to all cases where a landlord is, by the conduct of his tenant in removing goods from premises for which rent is due, turned over to the barren right of bringing an action for his rent. Where a tenant openly and in the face of day, and with notice to his landlord, removed his goods without leaving sufficient on the premises to satisfy the rent then due, and the landlord followed and distrained the goods: held that, although the removal might not be *clandestine*, yet as it was *fraudulent* (which was a question for the jury,) the landlord was justified under the statute.

TRESPASS for breaking and entering plaintiff's house and seizing his goods. Pleas—first the general issue, not guilty; and second, a justification under the statute 11 *Geo.* 2 c. 19., that the goods had been fraudulently and clandestinely removed by plaintiff to the place in which, &c. to prevent defendant from distraining them for rent in arrear. Replication, taking issue on both pleas. At the trial before *Abbott*, C. J. at the adjourned *Middlesex* Sittings after last term, the facts were these:—The distress complained of was made on the 18th *January*, 1822, upon premises occupied by the plaintiff in *Rosemary Lane*, in the parish of *Whitechapel*, for 7*l*., a quarter's rent due for premises in *Ship Alley*, in the parish of *St. George*, held by the plain-

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tiff as tenant to the defendant *Smith*, and which became due on the 25th *December*, 1821. The plaintiff began to remove his goods from *Ship Alley* to *Rosemary Lane*, on the 17th *January*, in the middle of the day. The defendant *Smith* lived next door to the plaintiff in *Ship Alley*. Many of the goods, previously to their being carried away to *Rosemary Lane*, were placed in the open street. The defendant *Smith* had notice of the removal while it was going on, and had an interview with the plaintiff on the subject. The removal was continued on the next day, the 18th *January*, on which day, and before all the goods were removed, the distress was made; but the goods not then removed were insufficient to satisfy the rent. When the broker came to levy the distress, the landlord of the premises in *Rosemary Lane* remonstrated against it, and offered to pay the rent due, if the goods remaining in *Ship Alley* were not sufficient to cover it. The learned Judge told the jury, that if they thought the goods were removed for the purpose of depriving the defendant of his remedy by distress, they were bound to find their verdict for the defendants. The question was, what was the object of the removal. It certainly appeared, that the goods were removed in the most convenient manner; but it also appeared that the goods ultimately remaining on the premises of the defendant *Smith* were not sufficient to satisfy his demand. To bring the case within the statute, the removal must be clandestine, or fraudulent. Here the removal was not clandestine, but still it might be fraudulent, and it was for them to decide that question. The jury found their verdict for the defendants.

Scarlett now moved for a rule to show cause why this verdict should not be set aside, and a new trial had, upon the ground that the learned judge had misdirected the jury. The jury should have been told that there was no evidence to support the defendants' plea, and should have been directed to find a verdict for the plaintiff; for, in fact, the plea

was wholly unsupported, and indeed negatived by the evidence. The statute requires that the goods shall be "clandestinely or fraudulently" removed, in order to justify the seizure; but here the removal was in open day, before the view of the landlord himself, and notorious to all the neighbourhood, and could not therefore be deemed either clandestine or fraudulent within the meaning of the statute, or of common sense. The present case is expressly within the decision of *Eyre*, C. J. in *Watson* v. *Main* (a), where he said "I am of opinion that, in order to subject goods to be taken as upon a fraudulent removal, the removal must be secret, *and not open and in the face of day*." The same principle was laid down by Lord *Ellenborough*, C. J. in *Furneaux* v. *Fotherly* (b), where he said, "Where goods are fraudulently removed from the demised premises *in the night* to prevent a distress for arrears of rent due the next day, the case certainly comes within the mischief intended to be remedied by the act." [*Bayley*, J.—The words of the statute are, "clandestinely, *or* fraudulently." A removal may be fraudulent, though it is not clandestine.] There was no dishonest conversion of the goods here; they were removed from one house where they were useless, to another where they were really wanted, both being in the occupation of the plaintiff. There was no evidence that the defendant had demanded his rent before the removal, and no ground for supposing that any fraud was intended towards him.

ABBOTT, C. J.—Certainly this cannot be called a clandestine removal; but if it was fraudulent, it will support the plea. The evidence of fraud, I admit, was slight, but I think there was some. One object of the statute was to give the landlord a more speedy remedy than an action for the recovery of his rent would afford him, and I cannot say that this landlord was not entitled to that remedy. I think there was evidence of fraud sufficient to go to the jury, and

(a) 3 Esp. 15. (b) 4 Camp. 136.

as they have found that the removal was fraudulent, we ought not to disturb their verdict.

BAYLEY, J.—I am by no means satisfied that there was any proof of fraud in this case; indeed, I incline to the contrary opinion. It did not appear that the plaintiff was in insolvent circumstances, and the removal was in the day-time, notorious to all his neighbours, and known to the landlord himself. But still, as the evidence was matter for the jury to decide upon, I think we should hardly be justified in impugning their decision.

BEST, J. (a)—I think there was some evidence of a fraudulent intention, though I must confess, it is exceedingly slight. It is the duty of every tenant, when he is about to quit his residence, to pay his landlord his rent before he removes his goods, and the fact of removing the goods before the rent is paid, or in any manner provided for, implies something very like an intention to evade the payment altogether. The statute 11 G. 2. c. 19. in my opinion, applies to all cases where the landlord is, by the conduct of his tenant, turned over to the barren right of bringing an action for his rent. In this case, there is no evidence that the rent was tendered before the removal began, and therefore I think there was some evidence of fraud to go to the jury. I agree, therefore, that this verdict ought not to be disturbed.

Rule refused.

(a) *Holroyd*, J. was sitting in the Bail Court.

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SKAIFE, Assignee of ALLAN, a Bankrupt, *v.* HOWARD.

In an action by the assignees of A. against whom a commission was sued out upon the petition of the assignees of B. and no notice being given to dispute the validity of the commission: Held, upon 49 G. 3. c. 121. s. 10. that proof of the proceedings under A.'s commission was sufficient evidence of the petitioning creditor's debt, without going into any evidence of the validity of B.'s commission.

THIS was an action for goods sold and delivered by the bankrupt to the defendant. Plea, non assumpsit. At the trial before *Abbott*, C. J. at the *London* adjourned sittings after last term, to prove the plaintiff's title to sue as assignee of *Allan*, (no notice having been given to dispute the bankruptcy,) the proceedings under the commission were put in, pursuant to the 49 G. 3. c. 121. s. 10. From these it appeared, that the commission had issued on the petition of "Messrs. *Swaine* and Co. assignees of *James Millar*, a bankrupt," upon a debt amounting to 147*l*. due to them as such assignees. On the part of the defendant, it was contended, that the plaintiff had not done enough to make out his title to sue as assignee; for admitting that the statute placed the depositions taken before the Commissioners on the same footing as parol proof of the proceedings in bankruptcy, still in this case it was necessary to go a step higher, and prove that *Millar* was, in point of fact, a bankrupt, and that the persons who sued out the commission were in fact his assignees. The Lord Chief Justice, however, thought that such additional evidence was unnecessary, but reserved the point with liberty to the defendant to move for a new trial, or to enter a nonsuit.

Marryatt now moved accordingly for a new trial. The statute 49 G. 3. c. 121. s. 10. does not dispense with the proof contended to be necessary in this case. All that it does, is to enact that the commission and the proceedings under it shall be received as evidence of the petitioning creditor's debt, trading, and act of bankruptcy, unless notice be given that those matters are disputed. In this case, no such notice was given, but still it was necessary to prove that the persons who appeared on the face of the proceedings to be the petitioning creditors, really had authority to act in the character they assumed. They were merely described as the assignees of *Millar*; non constat that

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they really were so; and therefore the proceedings under *Millar's* commission ought to have been produced in order to prove that they were entitled to assume the character in which they appeared. Prior to the statute, if the petitioning creditor was the assignee of A., and in that character sued out a commission against B. as the debtor of A., it would have been necessary to give parol proof of all the stages of bankruptcy in both cases. *Doe*, d. *Mawson* v. *Liston*. (a) The statute only dispenses with the necessity of proving by parol evidence the existence of a debt; but here there was not such evidence as the statute requires to prove the debt upon which the present commission was founded. It was necessary therefore to lay some ground for showing that Messrs. *Swaine* were really the assignees of *Millar* to entitle them to sue out the commission against *Allan*. [*Bayley*, J.—You must say that if an executor sues out a commission of bankrupt, he must produce the probate of his testator's will. *Best*, J.—And that an heir must prove the title of his ancestor.] It is clear that before the statute, an executor must have produced the probate, if he sued out a commission of bankrupt in his representative character.

ABBOTT, C. J.—The 10th section of 49 G. 3. c. 121. is in my opinion to be considered as a remedial enactment. The object of it was, to prevent the assignees from being compelled in every case in which they brought an action, to go through the laborious proof of every thing necessary to sustain the commission where there was really no question or dispute; and therefore it provides that the commission and the proceedings under it, shall be evidence to be received of the petitioning creditor's debt, &c. unless notice shall be given of an intention to dispute such matters or any of them. It does not bind the defendant; because, by giving notice to dispute the proceedings, the plaintiff will be obliged to go through the formal proof, in order to remove

(a) 4 Taunt. 741.

any doubt of their validity. I agree that if the proceedings when produced (taking them as evidence of the truth of what they allege) do not sustain the bankruptcy, the proceedings will not by themselves be sufficient. There have been cases where, upon the reading the depositions, it has turned out that the act of bankruptcy is not sufficiently proved, and the plaintiff has been obliged to go farther and give better evidence; but I am not aware of any case in which it has been held, (taking for truth that which is contained in the depositions,) that the depositions have not been deemed sufficient proof of the bankruptcy. Now if we are to take for truth that which the depositions in this case contain, enough will be found to sustain the commission, because they contain an allegation that the debt is due to the parties who sued out the commission in the particular character in which they have sued, namely as assignees of *Millar;* and if we were not to hold the proceedings to be sufficient proof of what they contain, we should be giving but a very imperfect and partial application of this beneficial enactment to this and many other cases arising under the bankrupt laws. The statement that this act is only to supply the place of parol proof of the debt is not correct; because prior to this statute, the creditor himself who sued out the commission could not have proved the debt; he must have resorted to other witnesses. That difficulty is now removed, and in ordinary cases the petitioning creditor himself may depose to his debt in support of the commission. Then again; before this statute the petitioning creditor was not a competent witness, in an action brought by the assignees, to prove the debt due to himself, and it became necessary to prove it by other means. This statute however has removed that necessity, and has made the deposition proof in a case in which the parol evidence of the deponent would not have been admissible. Then are we not to give this provision its full effect? I think we ought, and that we are bound to hold that the depositions are evidence of a debt due to the petitioning creditor, in the character in which

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he has sued out the commission. Suppose the case of an executor or administrator, who becomes the petitioning creditor in suing out a commission, would it be necessary to produce the probate or letters of administration, to show that he was executor or administrator? I think not. Instances of that kind have occurred within my memory. I do not remember any others of the like kind; but they are sufficient to satisfy my mind that, in order to give effect to this act of parliament, which is remedial, we must decide that the proceedings under a commission of bankrupt (unless disputed by notice) must be taken as conclusive proof in all cases where the facts deposed to, if proved by parol evidence, would be sufficient to sustain the commission.

Bayley, J.—I am of the same opinion.

Best, J. (a)—One of the greatest evils of the bankrupt laws, prior to this statute, was the necessity imposed upon assignees, in every action brought by them in matters concerning the bankrupt's estate, of going through the laborious proof of all the proceedings under the commission before they could arrive at the question intended to be tried. This statute has remedied that evil completely. The words of the 10th section are, "that the proceedings under the commission *shall be* evidence" of the facts which they state; but if the proceedings when received are not sufficient in point of law to sustain the bankruptcy, then the plaintiff's title to sue as assignees cannot be sustained.

On another ground stated by affidavit, the Court granted a rule nisi for a new trial.

(a) *Holroyd*, J. was sitting in the Bail Court.

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Saturday, January 31.

AARON v. CHAUNDRY.

After issue joined in assumpsit on a promissory note, plaintiff, being ruled to enter the issue, entered a plea of *not guilty*, instead of *non assumpsit*, whereupon defendant signed judgment of non pros. but the court set it aside without costs.

ADOLPHUS on a former day obtained a rule nisi for setting aside the judgment of non pros. signed by the defendant in this case, for irregularity, with costs. It was an action upon a promissory note, and the defendant, having pleaded non assumpsit, made up the issue, and ruled the plaintiff to enter it. The plaintiff entered it with a plea of *not guilty*, instead of non assumpsit; upon which the defendant signed his judgment of non pros.

Campbell now showed cause, and contended that, inasmuch as the plaintiff had not entered the issue which was actually joined in the action, there was no irregularity in the defendant signing judgment of non pros. He relied upon *Wood* v. *Miller*. (a)

Adolphus, in support of the rule, was stopped by the Court.

ABBOTT, C. J.—This case is perfectly distinguishable from *Wood* v. *Miller*. That case only decided that the issue must be entered as of the term when the rule to reply was given and the similiter joined, and not as of the preceding term, when the plea was given. The objection there was, that the issue was entered as of a wrong term. In substance, the plea of Not-Guilty, in a case like the present, is the same as non assumpsit; but where so much carelessness is apparent, we shall make the rule absolute without costs.

Rule absolute without costs.

(a) 3 East, 204.

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Bishop and Another *v.* Macintosh and Another.

By 43 G. 3. c. 56. s. 2. it is declared unlawful to convey in any ship from any place in the *United Kingdom* to any part beyond sea, a greater number of persons than in the proportion of one for every two tons of the burthen of the ship; and every ship shall be deemed of such burthen as is set forth in the certificate of registry: and if any ship shall be partly laden with goods, then it shall not be lawful for the master to receive on board a greater number of persons, including the crew, than in the proportion of one person for every two tons of that part of the ship remaining unladen. Where a vessel registered at 230, but in fact measuring 269 tons burthen, was partly laden with goods, and carried passengers in proportion to her measured tonnage: held that she was to be deemed only of the tonnage described in the certificate of registry, and that her actual tonnage could not be taken into consideration.

Assumpsit. The declaration stated, that in consideration that the plaintiffs had sold and delivered to the defendants certain ships' stores, and had also effected a policy of insurance on a vessel called *The Hope*, on a voyage from *England* to *New South Wales*, for 332*l.* to be received by the plaintiffs in *New South Wales*, at the termination of the voyage, the defendants undertook (unless prevented therefrom by inevitable accident) that they would cause the voyage to be performed, and the money to be paid to the plaintiffs at *New South Wales*, within a reasonable time. Averment that the defendants did not, although not prevented therefrom by inevitable accident, cause the voyage to be performed, or the money to be paid within a reasonable time. Plea, non assumpsit. At the trial before *Abbott*, C. J. at the *Middlesex* sittings, after last *Michaelmas* term, the case was this:—The plaintiffs had shipped on board the defendants' vessel, called *The Hope*, a quantity of ships' stores to be carried to *New South Wales*, and had effected a policy of insurance on the vessel for the voyage, in pursuance of a stipulation on the part of the defendants, for that purpose. The vessel sailed from *London*, and on her arrival at *Ramsgate*, she was detained by the officers of the customs, on the ground that she had a greater number of passengers on board, proportioned to her tonnage, than was allowed by 43 *Geo.* 3. c. 56. s. 2. (*a*) It appeared

(*a*) By which it is enacted, "That it shall not be lawful to convey from any place in the United Kingdom to any parts beyond sea, in any ship, a greater number of persons, whether adults or children, including the crew, than is the proportion of one person for every two tons of the burthen of such ship or vessel: and every ship shall be deemed and taken to be of such tonnage or burthen as is described and set forth in the respective certificate of the registry of each and every such ship; and if any such ship or vessel shall be partly laden with goods, wares, or merchandise, then it shall not be lawful for the master to receive or take

that in the certificate of the ship's register she was stated to be of the burthen of 230 tons, but in point of fact she measured 269 tons. She was partly laden, and had 90 passengers on board, and a crew of 17 men, including the master. Her cargo was stowed in the hold, and not between decks. On the part of the defendants it was admitted that, if the vessel was to be deemed and taken as of the burthen stated in the register, there were more passengers on board than the law allowed, and consequently the detention of the vessel by the officers of the customs was justifiable; but it was contended that, according to the true construction of the act of parliament, the vessel had no more passengers on board than she was allowed to take, and consequently, the detention being unlawful, the defendants were not liable in this action, inasmuch as they were hindered and prevented from performing the voyage, by inevitable accident, within the meaning of the contract. The Lord Chief Justice was of opinion that, according to the sound construction of the 43 G. 3. c. 56. s. 2. the certificate of the ship's register must be deemed and taken to be conclusive evidence of her burthen; and it being admitted that the vessel had more passengers on board in proportion to her burthen so evidenced than the law allowed, the plaintiff was entitled to a verdict. The plaintiff had a verdict accordingly, and now

Copley, A. G. moved for a new trial, and contended that, although the tonnage mentioned in the register was 230; yet inasmuch as the vessel actually measured 269 tons, the number of passengers was not disproportioned to the tonnage, and consequently she was not liable to seizure.

take on board a greater number of persons, including the crew, than in the proportion of one person for every two tons of that part of such ship or vessel remaining unladen; and such goods, wares, and merchandise, shall at the sight and under the direction of the collector or comptroller, or other officer of the customs, at the port or place where such goods, wares, and merchandize, shall be taken on board, be bestowed and disposed of in such manner as to leave good and sufficient and wholesome accommodation for the proportion of persons thereby allowed in such case to be received on board."

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It may be true that with respect to a vessel not carrying a cargo, the tonnage is to be deemed and taken to be that mentioned in the certificate of the ship's register; but still, if the vessel is only in part laden with goods, then the actual tonnage may be taken into consideration; and therefore the vessel having been improperly detained, the defendants come within the exception contained in the contract between the parties.

ABBOTT, C. J.—We are all of opinion that this case is too plain for argument. The words of the Act admit of no doubt, that whether a vessel be partly laden or not with goods, she shall be deemed and taken to be of such burthen as is described and set forth in the certificate of her register. Here the vessel was described in the certificate of the register as being of the burthen of 230 tons only, and we think that her actual admeasurement cannot be taken into consideration in calculating the number of passengers taken on board.

Rule refused. (*a*)

(*a*) The statute abovementioned has been since altered by an act of the present session of parliament.

Tuesday, February 3.

COLLINS *v.* GOODGER.

Where the deponent, in an affidavit to hold to bail, described himself as of *Dorset Place, Clapham Road, Middlesex,* and his true residence was *Dorset Place, Clapham Road, Surrey,* the Court ordered the bail-bond to be cancelled, and a common appearance entered.

PLATT, on a former day, had obtained a rule calling on the plaintiff to show cause why the bail bond given by the defendant should not be delivered up to be cancelled, and common bail filed, for an objection to the affidavit to hold to bail. The plaintiff was described in the affidavit to hold to bail as of "*Dorset Place, Clapham Road, Middlesex;*" whereas the true description of his residence was "*Dorset Place, Clapham Road, Surrey.*" He referred to the rule of Court, *Mic.* 15. *Car.* 2. which requires that every affidavit to hold to bail shall state the true place of abode, and the true addition of the person making it.

Andrews urged for cause against the rule, that, as the defendant had not been at all misled by the mistake, the objection ought not to prevail.

ABBOTT, C. J. The rule of Court expressly requires, that the true place of abode of the deponent shall be set forth in the affidavit; and unless we adhere to a rule so expressed, we should open a door to the greatest laxity and carelessness. The rule must be made absolute.

Rule absolute. (*a*)

(*a*) Vide *Tidd*, 194.; 1 *Archbold's* Pr 51. citing 1 East, 18; 3 East, 154; 1 M and S. 103; 11 East, 528; 3 M. and S. 165; 3 B. and P. 550; and 4 Taunt. 154.

DOE *d*. Rev. JAMES HARRIS, Clerk, *v*. GEORGE MASTERS.

Tuesday, February 3.

In ejectment upon the forfeiture of a lease for non-payment of rent, where the proviso was, that, if the rent was in arrear for twenty-one days, the lessor might re-enter, "although no formal or legal demand shall be made for payment thereof" held, that ejectment for non-payment of the rent within the time stipulated might be maintained against the lessee, without demanding the rent, or actually re-entering the premises.

Although this case might not be strictly within the stat. 4 G. 2. c 28. sec 201., yet the Court refused to relieve the tenant by staying proceedings, upon bringing the rent in arrear, and the costs of the ejectment, into Court *after* trial.

EJECTMENT for a certain chapel, called *Spring Garden Chapel*, situate in *Spring Gardens*, in the parish of *St. Martin in the Fields*, in the county of *Middlesex*. The lessor of the plaintiff went for a forfeiture, by reason of a breach of covenant contained in a lease of the demised premises, for non-payment of rent. Plea, not guilty. At the trial before *Abbott*, C. J. at the *Middlesex* sittings after last *Trinity* Term, a verdict was found for the plaintiff, subject to the opinion of the Court on the following case.—By a certain indenture of lease, bearing date 7th *March*, 1821, and made between the lessor of the plaintiff, *James Harris*, of the one part, and the defendant *George Masters*, of the

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other part, the lessor of the plaintiff demised unto the said defendant the said chapel, called *Spring Garden Chapel*, for the term of seven years, [wanting fourteen days,] from the 25th *March*, then instant, at the yearly rent of 250*l.* payable half yearly, on the 29th *September*, and the 25th *March*, without deduction, except as thereinafter mentioned; the first half-yearly payment to be made on the 29th *September*, then next ensuing; and the said defendant did, amongst other things, covenant with the said *J. H.* that he would pay the reserved rent on the days and times appointed by the lease for the payment thereof. In the lease, was the following proviso: "Provided always, and it is hereby declared and agreed by and between the said parties hereto, and these presents are upon this express condition, nevertheless that in case the said rent shall be behind or unpaid for the space of twenty-one days next after the respective days whereon the same respectively are hereinbefore appointed to be paid, as aforesaid, although and notwithstanding no formal or legal demand shall be made for payment thereof; that then, and in such case, it shall and may be lawful for the said *James Harris* into and upon the said demised premises, or any part thereof, in the name of the whole wholly to re-enter, &c." On the 25th *March*, 1822, the second half year's rent became due, which not having been paid, or offered to be paid, Mr. *Harris* brought this ejectment, laying the demise therein on the 26th *April* last. No demand was made, on the part of Mr. *Harris*, of the rent, nor was any formal re-entry made for breach of the covenant, and there was sufficient distress on the premises to countervail the arrears of rent. The question for the opinion of the Court is, whether the lessor of the plaintiff is entitled to recover? If he is, the verdict to stand; if not, a nonsuit to be entered. (*a*)

(*a*) This case was argued at the Sittings after last *Michaelmas* Term, but was not reported in its proper place, in consequence of the motion made in the cause in this Term, as after mentioned.

Abraham for the lessor of the plaintiff. The question in this case is, whether there should have been a formal demand of rent, before the defendant can be evicted for a forfeiture. According to the construction of the proviso in the lease, it is quite clear, that no such demand was necessary. At common law, and by the statute 4 Geo. 2. c. 28. a demand of rent would be necessary before the tenant could be ejected; but this case is to be determined by the terms of the special provision in the lease, which is the contract between the parties. It is expressly stipulated, that if the rent shall remain unpaid for the space of twenty-one days after the day appointed for payment, the landlord shall be at liberty to re-enter, although no formal demand shall have been made thereof. This was an arrangement made with the mutual consent of the parties, in order to dispense with the formalities required by law. It was perfectly competent for them to enter into such a bargain, and whatever may be the strictness of law in cases where no such agreement is entered into, yet the parties must be bound by their covenant. In *Dormer's* case (*a*) it is said, that, "by special consent of the parties, re-entry may be for default of payment of rent, without demand of it." The same principle was recognized by Lord *Mansfield* and the whole Court in *Goodright* v. *Cator* (*b*), where it is said, that, if by the express terms of the lease a demand is dispensed with, no demand whatever is necessary. By the express terms of the lease here, no demand was necessary; and the plaintiff having broken the covenant by non-payment of rent for the space of twenty-one days after it was due, a forfeiture has been incurred, and the lessor of the plaintiff is entitled to judgment.

Curwood, contrà. The proviso in this lease did not dispense with the necessity, first of demanding the rent; and second, of making an actual entry before the defendant could be ejected. It is true that the terms of the proviso

(*a*) 5 Rep. 40. (*b*) 2 Doug. 477.

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appear to be very express and positive; but it is a rule that covenants which are to work a forfeiture must be construed strictly. It is found by the case that there was no demand of the rent, nor any formal re-entry for breach of the covenant, and that there was sufficient distress on the premises to satisfy the arrears of rent. The latter circumstance affords a strong reason why this proviso should be construed with strictness, as against the landlord. To hold, that no demand whatever of the rent was requisite in this case, would be contrary to the spirit both of the common and statute law upon such subjects. Undoubtedly at common law, great niceties were required to be observed in making a demand of rent (*a*), but it was only to relieve the landlord from those strict niceties, that the proviso in question was introduced into the lease, and not to dispense with all demand whatever. Consistently, therefore, with this proviso, some demand of rent was necessary, and in favour of a tenant, the Court will give a liberal interpretation to the covenant. Then, upon the same principle, an actual entry was necessary, before a forfeiture could be incurred. Merely bringing an ejectment was not sufficient; for supposing the Court should be of opinion that a demand of rent was dispensed with, then, upon the strict construction of the proviso, the only right given to the lessor was to re-enter for non-payment of the rent. On these grounds the defendant is entitled to judgment.

Abraham, in reply, was stopped.

Per Curiam. We think both points are against the defendant. As to the demand of rent, the cases which have been cited show that it was competent to the parties to enter into the covenant in question. By the terms of that covenant the defendant has expressly agreed to dispense with all the formalities which the law would have imposed upon the plaintiff, in demanding the rent before a forfeiture

(*a*) See *Sweton* v. *Cushe*, Yelv. 36; and *Doe* v. *Brydges*, ante vol. ii. 29.

could be incurred. Then as to the other point, it has been repeatedly decided that an actual entry is not requisite in a case of this description. In *Goodright* v. *Cator* (a) Lord *Mansfield* says, "we have looked very particularly into the cases for two hundred years back, and we find a great deal of contrariety on the question, whether an actual entry is necessary, in order to maintain an ejectment, on a clause of re-entry for non-payment of rent; but in the most distant period the better opinion has been that it is not. This was Lord *Hale's* opinion, and is mentioned as such, and as that of L. C. J. *Scroggs* by Lord *Holt* in the case of *Little* v. *Heaton*. (b) But we look upon it as having been fully settled in 1703 by the opinion of all the Judges upon deliberation, and consideration of all the cases, that actual entry is only necessary to avoid a fine, and so the practice has been ever since. The reason of the thing is agreeable to the practice, for it is absurd to entangle men's rights in nets of form without meaning; and an ejectment being a mere creature of the Court, framed for the purpose of bringing the right to an examination, an actual entry can be of no service." In that case also it was objected that there was no demand of rent, and the same learned Judge says, "There seemed to be some weight in that point, upon the reason of the thing; and on looking into the cases it appears to have a foundation in authority. But here, by the express terms of the lease, the demand is dispensed with. The act 4 Geo. 2. is very perplexed; but the meaning certainly only is, that where there is no stipulation in the lease for entry without demand, you may, notwithstanding, enter without demand, provided six months rent is in arrear, and there is not sufficient distress; otherwise in such cases you must make a demand." This is an authority in favour of the plaintiff on both points, and therefore the postea must be delivered to the plaintiff.

Postea to the plaintiff.

(a) Doug. 485.
(b) 2 Lord Raym. 751. 1 Salk. 259. S. C. Holt, 264.

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Curwood on a former day in this term obtained a rule nisi for staying all proceedings in the ejectment upon the defendants bringing into Court the arrears of rent claimed, and 100*l.* to answer the costs, in order that it might be referred to the Master to compute what was due for rent and costs, and that such sum should be paid to the lessor of the plaintiff.

Abraham, now showed cause. After trial this application comes too late. By 4 *Geo.* 2. c. 28. it can only be made before trial. The 4th section enacts, "That if the tenant do or shall at any time *before* the trial in such ejectment pay or tender to the landlord all the rent and arrears together with the costs, then in such case all further proceedings on the said ejectment shall cease and be discontinued." Before the passing of that statute the Court may have been in the habit of allowing a tenant to come in on the terms now proposed, but since then the practice has been otherwise. In *Roe* d. *West* v. *Davis* (*a*) a similar application was made after trial, and there Lord *Ellenborough*, C. J. said, "It may perhaps be true, that before the statute a practice obtained in this Court of relieving the tenant up to the extent contended for, but it appears by the words of the act that the legislature only meant to legalize that practice to a certain extent, namely, upon the application of the tenant *before* trial. If therefore we were now to extend the same relief to him *after* trial, we should be exercising the function of legislation instead of judicial construction, and should depart from the line which the statute has drawn." This is an express authority in point, and therefore this rule must be discharged with costs.

Curwood in support of the rule. This is not a proceeding under the statute 2 *Geo.* 2. c. 28. but is an application to the discretion of the Court, for an indulgence frequently granted before that statute passed. (*b*) One of the strong

(*a*) 7 East, 366.
(*b*) Salk. 597. 8 Mod. 345. 10 Mod. 383. and 2 Stra. 900.

arguments urged against the defendant when the special case was before the Court was, that the question, whether the plaintiff ought to have demanded the rent or made an actual entry was not to be decided by the common law, or by the 4th *Geo.* 4. c. 28, but by the special provisions in the lease, and therefore it cannot now be said that this is a case within the statute. That statute seems to contemplate such cases only as those in which the ordinary rules in the action of ejectment would be applicable, and not a case like the present. The 4th section, upon which the decision in *Roe* v. *Davis* was founded, has the word "such," (such ejectment) i. e. referring to the cases enumerated in the second section, none of which are cases of this description. It is true that the second section is in the disjunctive, and begins by stating first, that in *all* cases between landlord and tenant when half a year's rent shall be in arrear, and the landlord has a right of re-entry for non-payment thereof, he may bring ejectment, &c. *or*, in case the same cannot be legally served, &c. *or*, in case such ejectment shall not be for the recovery of any messuage, &c. and in case of judgment against the casual ejector or nonsuit for not confessing lease, entry and ouster, it shall appear by affidavit or be proved upon the trial in case the defendant appears, that half a year's rent was due, before the declaration served, and that no sufficient distress was to be found on the premises, and that the lessor had power to re-enter; *then* and *in every such case* the lessor in ejectment shall recover judgment and execution, &c.; but it is perfectly clear from this enumeration of the cases to which this section refers, that this is not one of those cases. It cannot be said therefore that *Roe* v. *Davis* is an authority for refusing this application in *all* cases *after* trial; and if it be so considered, it seems to have been decided without due regard to the words of the statute. This is to be decided as if the statute had not passed, and it seems but reasonable that the defendant should have that indulgence extended to him which the Court in former times was in the habit of granting to defendants in ejectment.

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Abbott, C. J. (a)—My learned brothers and myself agree in thinking that *Doe* v. *Davis* is a decision in point, and we are perfectly satisfied that if the ancient practice of the Court in letting in defendants in the manner now contended for, had been more extensive than it is stated to have been, still it ought not to be allowed to let in a particular case which happened not to be within the very terms of the statute. We consider the line drawn by the statute as the line beyond which this species of application ought not to be extended, even in cases not precisely within its terms. That is a very reasonable construction, and it is of great importance that the statute should be so construed, because we cannot conceive any thing more unjust, than that a tenant should be allowed to put his landlord to the trouble, delay, and expense of proving a case of forfeiture, and then turn round upon him after he is entitled to execution, and say, "Your ejectment shall not avail you; I'll pay you your rent and your costs, and I shall remain in possession of the premises and keep the lease." We certainly shall not sanction that doctrine, but put the same construction upon the statute in this particular case, as it received in *Roe* v. *Davis*.

Rule discharged with costs.

(a) *Holroyd*, J. was gone to chambers.

Tuesday, February 3.

Kain v. Old and Others, Executors of Dodds.

A. being sole owner of a British-built ship, signed and delivered to B. a written instrument describing the vessel, among other enumerated particulars, as being *copper-bolted*, &c. but *not reciting the certificate of her register*. At the bottom of the instrument was written the following memorandum:—"Sold the within-mentioned ship to B." The vendor afterwards received the purchase-money and executed a bill of sale to the vendee in the usual form, but the vessel was not therein described as copper-bolted. B. then resold the vessel to C. upon the like terms as he had bought her, and executed to him a similar conveyance. It turned out that the vessel was not copper-bolted, and C. brought case against B. and recovered damages for the

ASSUMPSIT. The declaration stated that in the life-time of *William Dodds*, in consideration that the now plaintiff *Kain* would buy from *Dodds* a certain vessel, to

wit, the *Snow Fortitude*, at the price of 1650*l.* to be therefore paid by plaintiff to *Dodds*, he (*Dodds*) undertook and faithfully promised plaintiff that the said vessel was then copper-bolted. Averment, first, that plaintiff, confiding in the promise of *Dodds*, bought the said vessel of him, and paid to him the price thereof; and that plaintiff, further confiding as aforesaid, afterwards, and after the death of *Dodds*, sold the said vessel to one *James Shepherd*, and upon such sale, warranted the vessel to be copper-bolted; that at the time of making the promise of *Dodds*, and at the time of the sale, the said vessel was not copper-bolted, by means whereof the said vessel had become and was of little value to plaintiff; and by reason thereof *Shepherd* brought an action against him for a breach of warranty, and plaintiff paid 1000*l.* in satisfaction of the damages and costs recovered against him by *Shepherd*, and in payment of his own costs in defending that action, to the damage of plaintiff of 2,000*l.* Plea, non assumpsit, and issue thereon. At the trial before *Abbott*, C. J. at the *London* Adjourned Sittings after *Trinity* Term, 1822, the plaintiff had a verdict, damages 783*l.* 5*s.* 6*d.* subject to the opinion of the Court upon the following case:—On the 25th *October*, 1816, the testator, being sole owner of a ship called *The Fortitude*, signed and delivered to the said *G. J. Kain* an instrument of which the following is a copy:—" For sale or charter, one boom-main-sail, one lower-steering-sail, one middle-stay-sail, and one top-gallant-stay-sail, *The Snow Fortitude, A.* 1. British built, copper-bolted, and new coppered in 1813, admeasures per register 277 tons; is well calculated for any trade where a vessel of her dimensions is wanted; lying in the *Surrey* Canal. Inventory (here followed an inventory of stores, furniture, &c.) Sold the within-mentioned ship to Messrs. *Kain* and Son

the breach of the warranty in that respect; and B. now brought assumpsit against A.'s executors upon the same warranty, averring as damage the verdict recovered against him by C.: Held that the action was not maintainable, inasmuch as the instrument containing the warranty, was void by the 34 G. 3. c. 68. s. 14. for not reciting the certificate of the ship's register.

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meaning *G. J. Kain*). *W. Dodds*." On the 28th *October*, 1816, the testator received the said 1650*l.* and duly executed a bill of sale of the said ship to the said *G. J. Kain*, which bill of sale accompanied the case, and contained the usual covenants, but it did not describe the ship as copper-bolted. On the 14th *September*, 1818, *Kain*, having expended a considerable sum of money upon the *Fortitude*, agreed to sell her to *J. Shepherd*, according to printed particulars substantially the same as those already set out. At the foot of those particulars *Kain* wrote, "I agree to sell Mr. *Shepherd* the *Fortitude*, with all her stores, as per inventory, for the sum of 2,300*l.* *G. J. Kain*." The *Fortitude* was conveyed by *Kain* to *Shepherd* by bill of sale, in the same form as that by which she had been conveyed by the testator to *Kain*. In *Hilary* Term, 1821, *Shepherd* commenced an action against *Kain* in the Court of King's Bench, in respect of the said last-mentioned sale. A copy of the declaration accompanied the case, from which it appeared that it was upon a warranty that the vessel was copper-bolted, with a count for a deceitful representation that she was copper-bolted. Upon the trial of that action, the jury found a verdict for *Shepherd*, damages 500*l.* which, together with 142*l.* 10*s.* taxed costs, were paid by *Kain* to *Shepherd* before the commencement of this action. *Kain's* own costs in that action amounted to 140*l.* 15*s.* 6*d.* and make, together with the two former sums, the aggregate sum of 783*l.* 5*s.* 6*d.* *Kain* gave no notice of the action of *Shepherd* v. *Kain* to *Dodds* or his executors. At the time of the sale of the ship by *Dodds* to *Kain*, the ship was not copper-bolted. The questions for the opinion of the Court are, Whether *Kain* is entitled to recover in this action, and to what amount. If the Court shall be of opinion that the action is maintainable, and that *Kain* is entitled to recover as well the damages recovered against him in the action of *Shepherd* v. *Kain*, as also the taxed costs paid by him, and his own costs in the said action, then the verdict is to stand for 783*l.* 5*s.* 6*d.* If the Court shall be

of opinion that he is entitled to recover the said two sums of 500*l.* and 142*l.* 10*s.* or is only entitled to recover in this action the damages found by the jury in the action of *Shepherd* v. *Kain*, then the verdict is to be reduced accordingly. But if the Court shall be of opinion that *Kain* is not entitled to recover any thing, then a nonsuit to be entered.

Manning, for the plaintiff. The objection raised on the part of the defendants to the maintenance of this action, is founded chiefly upon two cases. The first is *Biddell* v. *Leeder*, (*a*) which, though mainly relied on, is essentially distinguishable from the present case. The question there turned upon the construction of the Register Act, (*b*) and was decided upon the ground that the instrument contained words of present sale; for it is said there by *Bayley*, J. "If it be necessary, in order to bring an agreement within the operation of this statute, that it should convey a present interest, this agreement certainly possesses that character." And by *Holroyd*, J. "This instrument plainly shews that it is an agreement for an immediate and actual sale." But the instrument in this case contains no words expressive of any intent to make an immediate transfer of the vessel, and the court will not infer it, because they will rather presume that the parties meant to act in conformity to the law. *Biddell* v. *Leeder*, therefore, does not govern this case. The other case, *Pickering* v. *Dowson*, (*c*) certainly comes nearer the present in its circumstances; but the present objection, that such an instrument as this will not support an action, was never suggested there either by the bench or at the bar; the point decided there was, that where a representation is made before the sale with opportunity for the vendee to ascertain its truth, and the contract of sale is afterwards reduced into writing, but does not contain the representation, an action of deceit will not lie on the ground that the article sold does not answer the representation,

(*a*) Ante, vol. ii. 499. (*b*) 34 G. 3. c. 68. s. 14. (*c*) 4 Taunt. 779.

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whether the vendor knew of the defect or not. This objection was not raised by the present plaintiff in the action brought against him by *Shepherd*, the second vendee; and it would be extremely hard that it should prevail against him now. This instrument may not perhaps be binding, as an agreement, within the meaning of the Register Act; but it is a written representation by the vendor, followed up by a transfer of the vessel. [*Best*, J. If it is merely a representation, how can it be said to be a warranty binding upon the executors of the vendor?] The transfer was made in consequence of the representation, and therefore a warranty of the truth of the representation may be implied. It has been repeatedly held that a parol stipulation may be engrafted upon a written contract. *Meyer* v. *Everth*, (*a*) only decided that where the contract itself is in writing, parol evidence of a representation dehors the contract cannot be admitted. This instrument may be void as a transfer, or as an agreement for a transfer, because it does not recite the certificate of registry; and yet it may be valid and binding as a representation. If it is void in toto, *Kerrison* v. *Cole* (*b*) must be reversed, because it was there held that the Register Acts applied only to so much of the instrument as related to the conveyance of the property in ships. A custom would clearly be evidence to raise the presumption of the warranty; and it can make no difference whether such a presumption is raised by a custom, or by a communication between the parties. In *Wigglesworth* v. *Dallison*, (*c*) it was held, that although a lease had been executed, a collateral agreement between landlord and tenant might be proved by the custom of the country, without producing evidence of an express stipulation; and upon the same principle the representation of the vendor here is good evidence of a warranty by him that the ship was copper-bolted. The bill of sale here was not the agreement between the parties; it operated merely in execution of a prior agreement; it was the completion of an agreement,

(*a*) 4 Camp. 22. (*b*) 8 East, 231. (*c*) Doug. 201.

not an agreement itself, and would not have required a stamp. *Hodges* v. *Drakeford* (a). The words were those of one of the parties only; the covenants were only such as the law would have implied if they had not been expressed; and therefore, under such circumstances, the plaintiff is entitled to call in aid other evidence of the agreement really made between himself and the testator. *Jeffery* v. *Walton* (b) and *Baker* v. *Paine* (c). The construction of the statute now contended for, will not at all interfere with the intention or the policy of the legislature, which was merely that all the equitable as well as legal owners of vessels, should be ascertained and made known, and the court will not unnecessarily extend its operation, so as to annul bonâ fide contracts entered into between man and man.

Campbell, for the defendants. The action is in assumpsit, and therefore it was incumbent on the plaintiff to prove the promise and the consideration for it, precisely as stated in the declaration. But the agreement which contained the promise, and on which the proof of the promise was founded, is void under the statute 34 G. 3. c. 68. s. 14. for not reciting the certificate of registry; and in that point of view it is quite immaterial whether it is considered as an actual transfer, or only as an agreement for the transfer of the vessel. *Brewster* v. *Clarke* (d), *Biddell* v. *Leeder*, (e). It is impossible to distinguish the latter of those cases from the present. The agreement here is not a contract, and cannot be used as such; nor can it be used as a representation in evidence of a contract, because as it is void to all intents and purposes by the provision of the act of parliament, it cannot be legal evidence of a contract, or for any purpose connected with the support of an action at law. It is argued that it is a representation between the parties, amounting to a warranty; but even if it were, it could not

(a) 1 N. R. 270.
(b) 1 Stark. 267.
(c) 1 Vesey, 456.
(d) 2 Meriv. 75.
(e) Ante, vol. ii. 499.

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be binding, because it is not introduced into the subsequent agreement. If indeed the whole contract had been by parol, this representation might perhaps have been taken as a part of the contract; but here the contract is in writing, and therefore no verbal communication or promise can be engrafted upon it. For this the Countess of *Rutland's* case (*a*), *Meyer* v. *Everth* (*b*), *Gardiner* v. *Gray* (*c*), *Hope* v. *Atkins* (*d*), *Lano* v. *Neale* (*e*), *Powell* v. *Edmunds* (*f*), and *Pickering* v. *Dowson* (*g*), are authorities. Such a representation might, in some instances, operate so as to invalidate the contract, but it never can be made a part of it. The cases cited on the other side, are all distinguishable from the present; some of them turned upon a particular custom or usage; but even that was not admitted to contradict a written contract. Others were cases of a bonâ fide mistake in the written contract, and therefore they cannot apply to this case; and one was the case of a mere assignment indorsed on a lease. Perhaps, if the representation was false, the plaintiff might have been entitled to a remedy for the deceit; but though then it might be evidence to support an action ex delicto, it certainly cannot be made a part of the contract so as to support an action ex contractu, more especially against these defendants, who are the representatives of the vendor, and no parties themselves to the transaction.

Manning, in reply. In *Pickering* v. *Dowson*, the representation was omitted, not in the bill of sale, as it was here, but in the previous agreement. The doctrine laid down in the Countess of *Rutland's* case, and the other cases cited to the same point, goes only to the exclusion of parol evidence; but here the representation was in writing, the objection, therefore, does not apply. In *Stuart* v. *Wilkins* (*h*), which was an action for the price of an un-

(*a*) 5 Co. 26.
(*b*) 4 Camp. 22.
(*c*) Id. 144.
(*d*) 1 Price, 143.
(*e*) 2 Stark. 105.
(*f*) 12 East, 6.
(*g*) 4 Taunt. 779.
(*h*) Doug. 17.

sound horse, the declaration was in assumpsit, but the evidence given being of an express warranty, it was doubted whether such a form of action was good. It was held by the Court that it was; and it was said by Lord *Kenyon* to be the joint opinion of *Ashurst* and *Buller*, Js. "That this sort of declaration, where a warranty is to be proved, has been practised for twenty years, and that it is made use of with a view to let in both proofs, if necessary."

The case was argued first at the sittings after last *Hilary* Term, and afterwards before the full Court in last *Trinity* Term. The Court took time to consider of their judgment, which was now delivered by

ABBOTT, C. J.—This was an action of assumpsit to recover damages for the breach of an alleged contract. The declaration stated that in consideration that the plaintiff would purchase of the defendant's testator, a certain ship at a certain price, the testator undertook and promised that the ship was copper-bolted; that the plaintiffs, relying on that undertaking and promise, did purchase the ship and pay the price; that the plaintiff afterwards sold the ship to one *Shepherd*, with a warranty that she was copper-bolted; that the ship was not copper-bolted; and that *Shepherd* brought an action against the plaintiff upon his warranty, and recovered damages and costs against him. It appeared at the trial before me, that the defendant's testator, being sole owner of the ship, signed and delivered to the plaintiff an instrument in which the ship was described as copper-bolted, and which contained an inventory of stores, and at the end of which was written, "Sold the within-mentioned ship to Messrs. *Kain* and Son. *W. Dodds*." It also appeared that the testator received the sum of 1650*l*. from the plaintiff, and executed a bill of sale of the ship to him. That bill of sale was in the proper and customary form, containing a recital of the certificate of registry, but not describing the ship as copper-bolted. Further it appeared

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that the plaintiff resold the ship to *Shepherd*, by means of printed particulars, similar to those already described, and executed a bill of sale to him, similar to that which the testator had previously executed to him; and that *Shepherd* brought an action against the plaintiff upon his warranty that the ship was copper-bolted, in which he obtained a verdict. Upon these facts the question was, whether the plaintiff had proved a promise by the testator as laid in the declaration; and we are all of opinion that he has not. The first instrument, describing the ship as copper-bolted, containing an inventory of her stores, and concluding with the words, "Sold the within-mentioned ship to Messrs. *Kain* and Son, *W. Dodds*," cannot in our judgment be considered as a valid instrument of contract. Either as a conveyance, or as an agreement for the conveyance, of the ship, it is equally invalid by the Register Acts, because it does not contain a recital of the certificate of registry. For this the recent case of *Biddell* v. *Leeder* (a), is an authority expressly in point. It is imperfect as an instrument of contract, because it does not express the price. That omission is fatal, and is not supplied by any of the facts of the case, for it no where appears that any price was agreed upon between the parties before or at the time of the delivery of the paper by the testator to the plaintiff: and although the bill of sale does mention 1650*l.* as the amount of the consideration for the sale, it does not mention any previous agreement or contract for that sum. We do not, however, ground our judgment upon this point, because the Register Act is quite decisive to show that the paper is void to all intents and purposes, for not reciting the certificate of the ship's registry. The contract, then, rests exclusively upon the bill of sale, and in that the ship is not described as copper-bolted, although covenants for a good title, and for further assurance, are contained in it. The description of the ship in the paper as copper-bolted, must be taken to be merely a representation; it cannot

(a) Ante, vol. ii. 499.

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be treated as forming a part of the contract between the parties, because the contract is in writing, and a verbal representation cannot be engrafted upon it. In some instances, where the whole of the agreement is made by parol, every communication between the parties may be taken as part of the contract; but even this rule is open to exceptions, because the language adopted at the conclusion of a bargain may frequently subvert and annihilate the terms with which it began. But, wherever the contract is reduced into writing, nothing that is not found expressed in it can be considered as forming part of it. Matters existing before the contract was complete, or matters dehors the contract, may, under some circumstances, be admissible as evidence in its support, and to show the inducement for it; but the vendee is never at liberty to give such matters in evidence, except when he can prove that the vendor has been guilty of a fraud, in concealing a defect with which he himself was acquainted, and which ought in justice to have been communicated to the other party. These are not new principles; they are all fully and clearly laid down in the judgment of the late Lord Chief Justice *Gibbs* in the case of *Pickering* v. *Dowson* (a). That case seems to us to be quite decisive of the present, because the plaintiff here has neither alleged in his declaration, nor proved by his witnesses, any fraud on the part of the testator, but has selected as his cause of action, a specific contract, which he has been unable to substantiate. We are therefore of opinion, that the defendants are entitled to judgment.

Postea to the defendants.

(a) 4 Taunt. 779.

Tuesday, February 3.

MARY THRESHER *v.* the Company of Proprietors of the EAST LONDON Water Works.

Lime-kilns, though erected for the purposes of trade, during the continuance of a lease by indenture, containing a *general* covenant to repair, cannot be removed by the tenant without a breach of such covenant.

THIS was an action of covenant upon a lease, by plaintiff, as assignee of the reversion, against the defendants, as assignees of the term therein named. Breach, assigned in the usual form, on the covenant to repair. Plea, performance of the covenant, and issue thereon. At the trial before ABBOTT, C. J. at the *London* adjourned sittings after last *Trinity* Term, the plaintiff had a verdict, damages 500*l.* subject to the opinion of the court upon a case to the effect following: The indenture of lease upon which the plaintiff sued was made 29th *October*, 1791, by *Thomas Thresher*, her ancestor, to certain persons therein named, and recited a previous lease made *December* 2d, 1756, between the parties under whom the plaintiff and the defendants now claimed, which was not to expire till 1795, and which remained in force when the lease in question was made. On 19th *September*, 1783, the lessees of the lease of 1756 granted an under-lease of part of the premises for thirty-one years to one *Joseph Matthews*, which was not to expire till 1814, an interval of nineteen years after the expiration of the lease of 1756. The consideration for the under-lease of 1783 was a prior under-lease which had vested in *Joseph Matthews*, and it contained a covenant to repair, and to leave the premises in repair at the end of the term, "with all such erections and buildings as then were or should or might at any time or times thereafter be erected, built, or set up, in, upon, or about the same, or any part thereof." In 1780, *Joseph Matthews* erected a lime-kiln on the premises, at an expense of 160*l.* In 1790, *Thomas Ayres* and *John Walford*, the assignees of the term granted to *Joseph Matthews*, erected another lime-kiln on the premises; and it was stated in the under-lease of 1783, that there were at that time standing on the premises thereby demised a warehouse

and a stable. Both lime-kilns were in existence when the lease in question was granted, in 1791, and they were both built of brick and mortar, with their foundations let into the ground. The lime-kilns were erected for the purpose of carrying on the trade of a lime-burner on the premises. The chalk and the coals used in the business were brought up the river *Thames*, and the lime was sold to customers upon the premises. The demise in the lease of 1791 was of a piece of ground formerly called the *Ozier Hope*, and the wharfs and buildings erected and built thereon, situate, &c., and abutting, &c., as the same were demised by the recited lease of 1756; and it described the premises as being then in the occupation of the several persons therein named, and, among others, of one *James Ayres*, lime-burner, to have and to hold, &c. the said piece of ground, and the wharfs and buildings erected and built thereon. The covenant on the part of the lessees was to repair, uphold, and maintain that piece of ground, and the *erections and buildings*, wharfs, cranes, and ponds, and the hedges, ditches, pales, and fences, belonging to the premises, and the said premises so repaired, upheld, and maintained, to leave and yield up at the end of the term. The under-lease of 1783 subsequently vested in one *Richard Meeson*, who, after the expiration of that lease, continued for some time in possession of the premises as tenant from year to year, to the defendants, and who, about four years ago, pulled down the lime-kilns; and for that removal of the lime-kilns the present action was brought. The question for the opinion of the Court is, whether the removal of the lime-kilns was or was not a breach of the covenant, to repair in the lease of 29th *October*, 1791. If the Court should be of opinion in the affirmative, the verdict to stand for the plaintiff; otherwise, a verdict to be entered for the defendants.

Amos, for the plaintiff. The lime-kilns were fixtures, and were therefore included in the demise of the lease of 1791, because, where there is a conveyance of the freehold,

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the fixtures also pass under it. *Colegrave* v. *Dias Santos.* (a) They were standing upon the premises when the lease was made, and were part and parcel of the freehold; the lessee, therefore, had only the privilege of using them during the term, he had no power to remove them; *Lee* v. *Risdon.* (b) Whatever right to remove them existed under the lease of 1756, was annulled by the subsequent lease of 1791, for a new agreement for the enjoyment of the land, destroys a previous right of the tenant to remove the fixtures, *Fitzherbert* v. *Shaw.* (c) A demise of the land will carry all the buildings, although some of them only are specifically named, *Com. Dig. tit. Grant*, E. 3. The argument on the other side will be, that the lime-kilns not being in existence at the time of the first demise, and the second demise being of the premises, "as the same were demised by the former lease," they cannot pass by the second demise; but that is answered by the construction of law, which considers that buildings, erected during the continuance of the term, form a part of the premises demised, *Fitz.* N. B. 56. *Lord Darcy* v. *Askwith.* (d) Besides, the demise does contain the words "erections and buildings," and the lease contains a covenant to repair *them*, which could not refer to the erections in existence at the time of the former lease, for they were only a crane and a wharf, and could not answer the description given by the phrase "erections and buildings." *Burton* v. *Brown* (e) was exceedingly similar to the present case, and there it was held, that, under a lease of land, houses built upon the land after the lease made, did well pass; and *Brown* v. *Blunden* (f) is an authority for saying, that the premises were potentially demised by the first lease. Assuming, therefore, upon these authorities, that the lime-kilns were demised as part of the land, or that they passed by the lease of 1791, under the description of "erections and buildings," it is clear that it was the duty of the

(a) Ante, vol. iii. 255.
(b) 7 Taunt. 188. 2 Marsh. 495. S. C.
(c) 1 H. Bl. 258.
(d) Hob. 234.
(e) Cro. Jac. 648. Palmer, 319. S. C.
(f) Skinner, 121.

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lessee to keep them in repair, and to deliver them up in a state of repair at the end of the term, notwithstanding they were erected for the purposes of trade, *Naylor* v. *Collinge*. (a) The lime-kilns were irremoveable by their nature; their destruction must have preceded their removal; and it has never yet been held, that such fixtures could be removed. If that could be done, the largest and most expensive works and manufactories, erected for the purposes of trade during the continuance of a lease, might be pulled down and carried away at the end of the term; and then the very principle upon which fixtures of this kind have been excepted out of the common law rule which applies to fixtures, namely, a regard to the convenience of trade, would be defeated, and the exception would prove injurious, instead of being beneficial to the commercial interests of the country. The strict rule seems to be, that no implements of trade, no erections made for the purposes of trade, can be removed, except such as were by their nature chattels before they were so erected and applied; *Lawton* v. *Lawton*; (b) and that characteristic certainly does not appertain to these lime-kilns, for they were obviously and naturally parcel of the freehold, and never existed but in a freehold state. *Panton* v. *Robart* (c), *Dean* v. *Allaley* (d), and *Poole*'s case (e), will probably be urged on the other side as authorities for the defendants, but they are all mainly distinguishable from the present case. In the first, the varnish-house, which was held removeable, was a chattel, and had been brought from other premises of the defendant, where it had been used as such by him for the purposes of trade. In the second, it cannot be ascertained how the premises were described in the lease, or what was the nature of the articles removed. In the third, the only thing which was let into the ground, and partook of the nature of freehold, was the pavement, and the judgment certainly does not state that the Court held that removeable. Upon

(a) 1 Taunt. 19. (b) 3 Atk. 13. (c) 2 East, 88.
(d) 3 Esp. 11. (e) 1 Salk. 368.

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these grounds it appears that the verdict was right, and ought not to be disturbed.

Campbell for the defendants. The substantial question is, whether the lime-kilns were removeable during the continuance of the first lease. If they were, they must continue to be so, because the first was a continuing lease after the second was made, and after the lime-kilns were erected. Now it is clear that they might have been removed at any moment during the first term granted, for they were erected not with a view to increase the profits of the land, not for any object connected with the enjoyment of the land, not at all as parcel of or appurtenant to the freehold, but exclusively for the purposes of trade, and as chattels. It has been uniformly held, from the *Year Book*, 20 H. 7. fol. 13. pl. 24. down to the modern case of *Elwes* v. *Maw* (a), that things erected by the tenant for the purposes of trade, may be removed by him during the continuance of his term. Lord *Ellenborough*, in the latter case, after reviewing the leading decisions on this subject, says, "the Court may be considered as having decided mainly on this ground, that when the fixed instrument, engine, or utensil, (and the building covering the same falls within the same principle,) was an accessory to a matter of a personal nature, that it should itself be considered as personalty." The present case falls precisely within that rule. The tenant was a lime-burner; his trade, as such, was a matter of a personal nature; the lime-kilns, which are in fact merely furnaces, were accessory to that trade, and erected entirely for the purposes of it, and therefore were clearly removeable. The mode of removing them is perfectly immaterial; they might be removed either as a whole, or in parts; and the distinction endeavoured to be taken from the supposed destruction attending their removal, is quite new, and is unsupported by authority of any kind. In *Poole's* case (b), it is evident that the pavement was considered by the Court as remove-

(a) 3 East, 38. (b) 1 Salk. 368.

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able, on account of its being accessory to the trade of the brewer, and yet pavement let into the ground is in its nature more closely attached to the freehold than lime-kilns. In *Panton* v. *Robart* (a), it was held, that a tenant may remove fixtures at any period during his possession, even though, as regards the land, he has become a trespasser, by holding over. Then, as the first lease was in continuance when the second was made, and when the lime-kilns were erected, the right of removal remained. They were the property, not of the lessor, but of the lessee, and they were not demised by the second lease, because the lessor could not demise that which did not belong to him; and the lessee is not estopped from saying that, because the premises were demised "as the same were demised by the former lease," and in 1756, when the former lease was made, the lime-kilns were not in existence.

Amos, in reply, shortly recapitulated his former arguments, and insisted, first, that the lime-kilns, having been erected during the continuance of the first demise, must be considered as part of the then demised premises, and therefore passed under the second demise as the property of the lessor; and second, that they were in their nature, use, and description, strictly parcel of the freehold, and distinguishable from the articles in the cases cited for the defendants, which were all in the nature of chattels.

The case was argued in the course of *Michaelmas* Term, when the Court took time to consider of their judgment, which was now delivered by

ABBOTT, C.J.—The question presented for our consideration in this case was, whether the removal of the lime-kilns was a breach of the covenant to repair contained in the lease of 1791, and we are of opinion that it was. Three objections have been taken for the defendants. First, that

(a) 2 East, 88.

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lime-kilns are not buildings within the meaning of a covenant to repair buildings; but that the case answers, because it finds that they were erected with brick and mortar, and that their foundations were let into the ground. Second, that being erected for the purposes of trade, they were removeable generally. Third, that by the proper construction of the two leases, they were removeable also, and could not be considered as having been demised by the lease of 1791. Now the demise in that lease is of a piece of ground formerly called the *Ozier Hope*, and the wharfs and buildings erected and built thereon, situate, &c. and abutting, &c., as the same were demised by the lease of 1756, and the premises are stated to be in the several occupations of persons therein named, and among others, of *James Ayres*, lime-burner, habendum the said piece of ground, wharfs, and buildings thereon erected and built. The lessees covenant to repair, uphold, and maintain the said piece of ground, erections, and buildings, wharfs, cranes, and ponds, and the hedges, ditches, pales, and fences belonging to the premises; and the said premises so repaired, upheld and maintained, to leave and yield up at the end of the term. It is settled by the case of *Naylor* v. *Collinge* (a), that buildings erected for the purposes of trade, under a lease containing a covenant to repair, cannot be removed by the lessee, where the covenant is general in its terms, and contains no exception. Such a rule seems very reasonable, because the expectation that buildings will be erected during the term, and be left on the premises at the end of it, may frequently form an inducement to grant a lease, and may operate essentially upon the amount of the rent reserved. Then if buildings erected for the purposes of trade during the term cannot be removed without a breach of such a covenant, no more can buildings erected previously to, and existing at, the commencement of the term, unless there is some very special matter to withdraw them from the operation of the covenant. It may be doubtful

(a) 1 Taunt. 19.

whether any such special matter can exist dehors the instrument of demise; but on that point it is not necessary to decide now; it is enough, with reference to the present action, to say, that no such matter is to be found in this case. It has been contended, that such an exception is derivable from the true construction of the lease of 1756, and the under-lease of 1783. In the former, the description of the premises is "all that piece of ground called the *Ozier Hope*, with the use of a crane then standing on part of it, and part of which had been made into a wharf, for the landing, storing, and keeping goods, wherein are two docks, and the wharf is fenced off with pales, and part of which was formerly an ozier ground, but then converted into three ponds or reservoirs." The case does not state whether any covenant to repair was contained in that lease, and in all probability the instrument itself has been lost, and its contents are now known only from the recital of it in the lease of 1791, in which it is stated that the lessees had applied for a renewed term of thirty-one years, which was granted at an advanced rent. The lease of 1756, therefore, contains nothing which has the effect of restraining or qualifying, in any degree, the covenant to repair, contained in the lease of 1791; and no reason or rule of law has been suggested which can justify the lessees, after they have accepted a lease, *by indenture*, of the ground and the buildings thereon, in saying, that the ground only, and not the buildings thereon, were demised by that lease. The mere circumstance of the buildings having been erected by their under-lessee during the continuance of the first lease, would hardly support such a proposition, even if that under-lessee had a right to remove the buildings as against his lessors; because the original lessor could not be bound by any contract entered into between other persons. But the argument wholly fails when reference is had to the under lease of 1783, because in that, *Matthews*, the under-lessee, expressly covenants not only to repair the premises thereby demised to him, but to leave the premises, so repaired, at

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the expiration of the term, "together with all such erections and buildings as then were or should be at any time thereafter built or set up, in, upon or about the same, or any part thereof." Therefore the case of *Naylor* v. *Collinge* becomes directly in point, and shews, that the under-lessee could not have removed these lime-kilns without committing a breach of his covenant made with his own lessors. For these reasons we give judgment for the plaintiff.

Postea to the plaintiff.

Wednesday, February 4.

The KING v. BIGNOLD.

If the counsel for the defendant on the trial of an indictment for a misdemeanour opens new facts in his address to the jury, and afterwards declines calling witnesses to prove the facts so opened, the counsel for the prosecution is, notwithstanding, entitled to a general reply

THIS was an indictment against the defendant for alleged perjury, assigned upon an answer to a bill in chancery. At the trial before *Abbott*, C. J., at the *Middlesex* Sittings after last *Hilary* Term, after the case for the prosecution was closed, the defendant's counsel proceeded to address the jury, and in the course of his address, read some resolutions passed at a meeting of the proprietors of an insurance institution, with which the defendant was connected, and stated certain facts, which he conceived to be material to explain the defendant's conduct in the transaction out of which the prosecution arose; but upon after consideration he declined producing the resolutions in evidence, or calling witnesses to establish the facts which he had opened. Whereupon, the counsel for the prosecution claimed the right to reply upon the case so opened, and he mentioned a case from memory, where Lord *Kenyon* permitted that privilege to the prosecutor's counsel in consequence of the defendant's counsel having read an advertisement from a newspaper, but afterwards declined putting it in in evidence. Upon the authority of that case and upon principle, the Lord Chief Justice held, that the counsel for the prosecution had a general right of reply upon the defence which had been opened, although the facts and circumstances stated had not been established in evidence. The due administra-

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tion of justice required that such privilege should be allowed; because the statement of facts and circumstances unsupported by evidence could not but have an effect upon the minds of the jury. He should lay it down as a general rule that where counsel for a defendant opens facts upon the merits of the case, and declines calling witnesses to prove those facts, the counsel for the prosecution shall be entitled to a general reply. The counsel for the prosecution replied accordingly, and the defendant was found guilty.

The defendant being now brought up for judgment,

Copley, A. G., (with whom was *Chitty*) moved for a rule nisi to arrest the judgment on objections to the form of the indictment.

Abbott, C. J., having read his report of the trial adverted to the ruling abovementioned, and said "I was of opinion at the trial, and I am now of opinion, that if the counsel for a defendant, in his address to the jury, opens new facts or circumstances, which go to the merits of the case, and declines calling witnesses to support them in evidence, the counsel for the prosecution has a right of general reply."

Bayley, Holroyd and Best, Js., who were present, did not dissent from the propriety of this ruling.

The Court, upon the grounds stated in support of the motion to arrest the judgment, granted a rule nisi, which was afterwards made absolute.

Scarlett and *Adolphus* for the prosecution (*a*).

(*a*) Vide Dowl. and Ryl. N. P. C. 59.

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The costs to be paid by offenders under the Stage Coach Act, 50 G. 3. c. 48. must be ascertained by the conviction or it is bad.

The KING *v.* THOMAS PAYNE.

THE defendant had been convicted on the Stage Coach Act, 50 *Geo.* 3. c. 48. of carrying more outside passengers than is by law allowed, and in default of paying the penalty imposed by the statute was committed to the *Middlesex* House of Correction. The defendant being now brought up by Habeas Corpus, and the warrant of commitment returned by certiorari,

Brodrick moved to discharge him out of custody. The warrant of commitment recites the conviction, from which it appears that the defendant has been committed by the justices for three months, "unless before that time he pays the sum of 6*l.* together with the expenses of the warrant, viz. a sum of   shillings," without specifying the sum which he is to pay for expenses. This is a fatal objection; and *Rex* v. *Hall* (*a*) seems to be an authority in point. That was a conviction under 6 *Geo.* 1. c. 48. s. 1. for cutting down and carrying away a timber tree. The defendant was adjudged to pay a penalty of 15*l. together with the charges previous to* and attending the conviction, and he was committed for nine months or until the forfeiture *together with the charges previous to* and attending the conviction should be paid; and the charges not being ascertained, either in the conviction or commitment, the Court ordered the defendant to be discharged.

ABBOTT, C. J.—That case is certainly very much in point. The defendant here certainly cannot know on what terms he is to be discharged, and the gaoler is equally in the dark. The conviction and commitment should have ascertained precisely what sum for expenses the defendant was to pay. Let the conviction be quashed and the defendant discharged.

BAYLEY, J. (*b*) and BEST J., concurred.

Discharged.

(*a*) Cowp. 60. (*b*) *Holroyd*, J., was sitting in the bail court.

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PEARSON, Gent. one, &c. *v.* HENSON, Gent. one, &c.

Thursday, February 5.

An attorney of K. B. may sue an attorney of C.B. by attachment, but he may not arrest and hold him to bail. If he does, the Court will set aside the proceedings with costs for irregularity.

THE defendant, an attorney of the Court of Common Pleas, having been arrested at the suit of the plaintiff, an attorney of this Court, and a rule nisi having been obtained for setting aside the proceedings, with costs,

Platt now shewed cause and contended, first, that the rule must be discharged, because where plaintiff and defendant are attornies of different Courts, the plaintiff is allowed his privilege of suing the defendant by attachment; and in such case it is commonly said, that there is no privilege against privilege; the privilege of the plaintiff takes away that of the defendant. *Tidd*, 74. *Archbold*, 105. and the cases there cited. Second, that even if the rule could be made absolute, it must be without costs; and for this he cited *Barber* v. *Palmer* (a), as a direct authority: Sed per

BAYLEY, J., (b) In a case like this, though the defendant may not be privileged to be sued by bill, still his privilege from arrest extends to every Court, and does not merge in the larger privilege of the plaintiff. The plaintiff, therefore, is irregular, and the proceedings must be set aside; and, I think, they should be set aside with costs. *Barber* v. *Palmer*, in which I was of counsel, proceeded on very different grounds from any existing here. If the plaintiff had shewn any offer on his part to discharge the defendant upon his filing common bail, the rule might have been made absolute without costs; but as there is no such circumstance stated, I see no reason why the defendant should be burdened with the costs of this application.

Rule absolute with costs. (c)

(a) 6 T. R. 524. (b) The only Judge in Court.
(c) Vide 5 M. & S. 281. Tidd. 218.

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SOAMES and another *v.* LONERGAN and another.

In a charter party on the *St. P.* for a voyage from *G.* to bring home a cargo, to *Europe*, it was stipulated that in the event of the *non-arrival* at the same port of another ship, called the *G.* (which had been chartered by the same parties, and was then at sea), then the charter on the *G.* should be void to all intents and purposes whatsoever. Held that the word "non-arrival" could not be construed so as to defeat the purposes of the voyage for which the *G.* had been chartered, and her non-arrival for those purposes not being attributable to the fault of the charterers, the charter on the *St. P.* became void, and the charterers were not bound to provide her with a cargo.

ASSUMPSIT on a charter party of affreightment. The first count stated that plaintiffs were owners of a ship called the *St. Patrick*, and had agreed with defendants that she should proceed in ballast from *London* to *Cadiz*, remain there fifteen days, and from thence proceed to *Guyaquil*, and, if required, to any one other port on the western coast of *South America* which the freighters or their agents might appoint and direct; in which case, she should proceed first to that other port, and afterwards to *Guyaquil*. That, on her arrival at such destined port or ports, she should receive and take on board from the agents of the freighters, all such lawful goods and merchandize as they might think proper, up to a full cargo, and should proceed with such cargo to some port in *Spain*, *England*, or the continent of *Europe*, as the freighters or their agents might appoint and direct. That the ship should, if required, lay at her destined port or ports of loading for the purpose of receiving the cargo, and at her destined port of discharge for the purpose of unloading the same, 120 running days in all, to commence and be computed from the day of her arrival at her first port of loading, being admitted to pratique and ready to receive a cargo; to cease on her departure from such first port, to recommence on her arrival at the second port of loading, if ordered to more than one, being admitted to pratique and ready to receive a cargo; to cease again on her departure from such second port, and to recommence on her arrival at her destined port of discharge, being admitted to pratique and ready to deliver the cargo. That defendants agreed that they would, within fifteen days of her arrival at *Cadiz*, dispatch the ship to *Guyaquil*, or previously, to some one safe port on the western coast of *South America*, and would send alongside the ship, at such port or ports, such lawful goods as they might think proper, and would dispatch the ship to some one port in *Spain*, *England*, or the con-

tinent of *Europe*, and would there receive such cargo from alongside the ship within the 120 days thereinbefore limited for the purposes aforesaid, or within the days of demurrage thereinafter mentioned; and would pay the sum of 6000*l.* in full for the freight of the ship. That the ship did arrive at *Cadiz;* that she was ordered from thence to *Lima;* that she arrived at *Lima* on the 28th *March*, 1821; and that the master gave due notice of her arrival, and offered to receive a cargo on board. Breach, that defendants did not, either at *Lima*, or at *Guyaquil*, or at any other port on the western coast of *South America*, or elsewhere, send alongside the ship any goods, or supply any cargo, or dispatch her to any port in *Spain*, *England*, or the continent of *Europe*. Second count stated the charter-party in the same words, with a stipulation that the ship might be detained twenty days on demurrage, and with this proviso: "Provided always, and it was thereby understood and agreed by and between the said parties, that, in the event of the non-arrival of the ship or vessel called the *Grant*, *Hogarth* master, charted for and then on her voyage to *St. Blas de California*, at that port, then, in such case, that charty-party, and every clause and agreement therein contained, should, in case no shipment had been made under it, cease, determine, and be utterly void to all intents and purposes whatsoever." Averment, that the *Grant* did arrive at *St. Blas* according to the tenor and effect of the charter-party, with the other averments as in the first count. The third count alleged, that a certain other charter-party, was entered into between plaintiffs and defendants, in the same words and figures and to the same tenor and effect as that in the second count mentioned, and, after an averment of mutual promises, went on to state that, in consideration of the premises, it was agreed by and between plaintiffs and defendants that the proviso for annulling the charter-party, in the event of the non-arrival of the *Grant* at *St. Blas*, should extend to the event of the non-arrival of the *Grant* at *Guyaquil* from *St. Blas;*

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with an averment that the *Grant* did arrive at *Guyaquil* from *St. Blas*, and in other respects proceeding like the first count. The fourth count was similar to the third, but alleged that defendants promised to use due diligence on their part that the charter-party might not be annulled by the non-arrival of the *Grant* at *St. Blas*. Breach, that they did not use diligence, and that by reason of their negligence the *Grant* did not arrive at *St. Blas*. The fifth count was the same as the fourth, only alleging that *Guyaquil* was substituted for *St. Blas*. There were then several common counts. Defendants pleaded the general issue. The cause was tried before *Abbott*, C. J., at the *London* adjourned sittings after last *Trinity* term, when it appeared in evidence that a charter-party substantially conformable with that stated in the second count, was entered into between the parties, and that the proviso was agreed to be extended to the event of the non-arrival of the *Grant* at *Guyaquil* from *St. Blas*, as averred in the third count. That the *Grant* was chartered by Messrs. *Barron* and *M'Pherson*, merchants at *Cadiz*, and that the *St. Patrick* was chartered by the defendants on their account also. That the *St. Patrick* sailed from *London* in *October*, 1820, and arrived at *Cadiz* on the 15th *November* following; but that, previous to her leaving *Cadiz*, the master, on the part of himself and his owners, entered into another charter-party with *Don Juan de Arambuza*, a merchant at *Cadiz*, to bring home a cargo from *South America*, with this proviso: "That in the event of the arrival of the *Grant*, then on her voyage to *Guyaquil*, at that port; then, that charter-party, and every clause and agreement therein contained, should, in case no shipment had been made under it, cease, determine, and be utterly void, to all intents and purposes whatsoever." That the *St. Patrick*, being ordered by Messrs. *Barron* and *M'Pherson* to proceed to *Lima*, left *Cadiz* for that port on the 10th *December*, 1820, and arrived there on the 28th *March*, 1821, of which notice was given two days afterwards by the master to the agent of Messrs. *Barron* and *M'Pherson*, *Don Yzcue*. That the *St. Patrick*

remained at *Lima* till the 21st *July*, at which time the lay-days agreed upon by the charty-party expired, and after which time she was never employed under the charter-party, either by the defendants, or by Messrs. *Barron* and *M'Pherson*. That the *St. Patrick* was not dispatched from *Lima* to *Guyaquil* either by *Don Yzcue*, or by any other person acting for the charterers, nor any home cargo provided for her. That the *Grant* arrived at *St. Blas* on the 5th *March*, 1821, sailed from thence for *Guyaquil* on the 5th *June*, 1821, arrived there on the 19th *October*, 1821, and on the 10th *November*, 1821, the master made his protest, accounting for the delay which had occurred in his arrival, but not complaining that such delay had been occasioned by the freighters. That the *St. Patrick*, having remained at *Lima* after the 21st *July*, 1821, for the purpose of obtaining a home cargo, under the conditional charter-party, was on the 24th of that month seized by the forces under the command of Lord *Cochrane*, but released on the 23d *August* following, when she received on board a part cargo and 130 passengers for *Cadiz*, with which she was dispatched on the 12th *November*, sailed on the 15th, and, having touched at *Rio de Janeiro* in her way, arrived at *Cadiz* on the 12th *April*, 1822. The learned Judge told the Jury, that the arrival of the *Grant* as mentioned in the proviso, must be taken to mean an arrival in time for the purposes of the charter of the *St. Patrick*, and that unless they should be of opinion that the arrival of the *Grant* had been delayed by the negligence or misconduct of the defendants, or of the agent of Messrs. *Barron* and *M'Pherson*, they were bound to find a verdict for the defendants. The Jury found accordingly for the defendants. In the course of last term,

Copley, A. G., obtained a rule nisi for a new trial, upon two grounds; first, that the arrival of the *Grant* at *Guyaquil*, at any time during her then voyage, was a satisfaction of the terms of the proviso; and second, that the jury should have been directed to presume that the delay was occasioned

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either by Messrs. *Barron* and *M'Pherson*, or by the defendants.

Scarlett and *F. Pollock* now shewed cause. The object of chartering the *Grant* was, that the proceeds arising from her outward cargo might be applied in the purchase of a homeward cargo for the *St. Patrick*. The express condition upon which the charter-party was made, was the arrival of the *Grant* at *Guyaquil*, and, unless that condition contemplated an arrival consistent with the purposes of the voyage of the *St. Patrick*, it was at once inoperative and absurd. It is said, that the arrival of the *Grant* at any time was a sufficient discharge of this condition, and if the delay had been occasioned by the freighters of the *St. Patrick*, the argument might have some weight; but the jury have expressly negatived that fact. The circumstance of the *St. Patrick* not being dispatched from *Lima* to *Guyaquil* by the agent of her freighters, is immaterial to the question; because, if she had proceeded to *Guyaquil*, the captain would not have been bound to remain there beyond the 120 days; and, consequently, unless the *Grant* had arrived there within that period, the charter of the *St. Patrick* must have been annulled by the terms of the proviso.

Copley, A. G., and *Campbell*, contrà. It was laid down to the Jury, as matter of law, that the condition of the proviso could only be construed to mean, an arrival of the *Grant* in time for the purposes of the charter of the *St. Patrick*; and if that be not the proper legal construction of the proviso, the defendants are clearly entitled to a new trial. It is admitted that the arrival of the *Grant* at *Guyaquil* at any moment before the 120 days had expired, would have satisfied the condition of the proviso; but even that would not have served the purposes of the charter of the *St. Patrick*, because that vessel remained the whole 120 days at *Lima*, instead of being dispatched to *Guyaquil* by her freighters, as she ought to have been. The proviso de-

scribes the *Grant* as "now on her voyage;" therefore the arrival contemplated clearly was an arrival in the course of her voyage, and as she did arrive in the course of her voyage, she fulfilled the condition in the charter of the *St. Patrick*. The proviso does not make mention of the *St. Patrick*, nor in any way express any connection between that vessel and the *Grant;* therefore the voyage of the *St. Patrick* cannot properly be taken into account in construing a charter-party exclusively applying to the *Grant*. The true time of arrival suggested by that charter-party, is an arrival in the course of the voyage; none other can be collected from the terms of the instrument; and therefore none other was necessary.

ABBOTT, C. J.—I think we ought not to grant a new trial in this case. I left it to the Jury, as a question of fact, whether the delay in the arrival of the *Grant* had, or had not, been occasioned by the negligence or misconduct of the defendants, telling them that if it had, her non-arrival was not in law a defence to the action; and they found that the delay was not occasioned by the defendants. I then told them that, according to the true construction of the charter-party, the arrival of the *Grant* must be taken to mean such an arrival as would suit the purposes of the freighters of the *St. Patrick*, and that it was not limited to the voyage in which she was engaged, because that might be, and in point of fact was, too late for the purposes of the other voyage. I am of the same opinion now. Looking at the charter-party alone, I think the arrival of the *Grant* was not limited to the course of her voyage, and that the proviso could not be satisfied, but by her arriving either within the 120 lay days, or the additional 20 demurrage days It seems to me that this is the proper view of the case, and therefore that the defendants are not liable in this action.

BAYLEY, J.—The question is, what is the proper meaning of the word "non-arrival," for upon that, the merits of this case principally, if not altogether, depend. Now the

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meaning of it may be indefinite, and then the whole transaction sinks into a mere wagering bargain between the parties. But it may mean non-arrival in time for the purposes of the voyage of the *St. Patrick*, and I am of opinion that the latter is the proper construction. If so, the *Grant* ought to have arrived, either within the 120 running days, or within such further period as the captain of the *St. Patrick* chose to remain at *Guyaquil*, for an arrival at any moment during his stay there would have served the purposes of his freighters. If the meaning of "non-arrival" was indefinite, there could have been no possible motive for inserting the proviso in the charter-party upon which the action is brought, because it would then become absolutely unconnected with any of the purposes of that instrument. By the other construction, they become essentially connected. The probability is, that both parties expected that the *Grant* would arrive before the *St. Patrick*, and contemplated that such an arrival would tend to promote the views of the freighters of the *St. Patrick*. If the *Grant* had not arrived within the 120 running days, or the 20 demurrage days, the captain of the *St. Patrick* might, if he had thought proper, have waited still longer; and then perhaps the arrival of the *Grant*, while he so waited, might have satisfied the proviso, and have given the plaintiffs a claim to the freight. Certainly, if the delay had been occasioned by the defendants, they could not have set that up in answer to the action; but the Jury have disposed of that question, and I think rightly, because the plaintiffs did not prove the affirmative, and the defendants could not be called upon to prove the negative. I am therefore of opinion that there is no pretence for disturbing this verdict.

BEST, J.—(a) I am of the same opinion. The Jury have decided that the defendants did not occasion the delay in the arrival of the *Grant*, and the only question therefore for our consideration is, whether the construction put

(a) *Holroyd*, J., was sitting in the Bail Court.

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upon the charter-party by my Lord Chief Justice at the trial, was the correct construction, which I am satisfied it was. It is not unimportant to consider what line of conduct the plaintiffs have adopted, and it seems to me that they have by their own acts put an end to their claim. Undoubtedly if the *St. Patrick* had waited until the *Grant* arrived, the owners might properly have insisted that she should have been furnished with a homeward cargo; but although the voyage spoken of in the proviso may mean the voyage in which the *Grant* was then employed, and although the *Grant* did arrive at *Guyaquil* in the course of that voyage; still the object of the charter-party was defeated, because the captain of the *St. Patrick* had already disabled himself from fulfilling it, by abandoning the original contract and entering into another. It is said that the charterers were bound to load the *St. Patrick* within 120 days, and the charter certainly does contain an agreement of that nature; but that cannot have reference to the proviso, because, until the *Grant* had arrived, it remained uncertain whether the charter would or would not be void. Before the *Grant* did arrive, the *St. Patrick* was engaged in the performance of a new contract, and therefore the defendants were released from their obligation to furnish a homeward cargo for her. For these reasons I am of opinion that the plaintiffs cannot maintain this action.

Rule discharged.

HEAFORD *v.* M'KNIGHT.

Thursday, February 5.

Security for costs required of a plaintiff who had taken the benefit of an Insolvent Act, after issue joined, but before notice of trial given.

HUTCHINSON on a former day obtained a rule calling on the plaintiff to shew cause why the proceedings in this action should not be stayed until he gave security for costs. It appeared from the affidavit in support of the rule that issue being joined in *Hilary* Term, 1822, the plaintiff gave notice of trial for the adjourned Sittings after that Term,

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but afterwards countermanded his notice. On the 13th of *May* following he was discharged under the Insolvent Debtors' Act. 1 *Geo.* 4. c. 119, having inserted in his schedule the debt in question, as being due to him from the defendant, and having executed the usual assignment of all his estate and effects to the provisional assignee as required by the Insolvent Act. Notwithstanding this the plaintiff proceeded in his action, and on the 15th *January* last gave a second notice of trial, and the defendant swearing that he had a good defence upon the merits, the Court granted a rule nisi for security for costs.

Denman, C.S. now shewed cause against the rule, and contended that this was not a case in which the Court would require the plaintiff to give security for costs. Primâ facie the debt for which the plaintiff sued was his sole property, and at all events he must be considered as suing for the benefit of his creditors to whom he would be liable to pay it over when recovered. No creditor had interfered, nor did any regular assignment to a creditor appear to have been executed. It might be true that an assignment had been executed to the provisional assignee of the Insolvent Debtors' Court, but unless he interfered, the debt might never be enforced, and the plaintiff's estate would be thereby prejudiced. The plaintiff might never be able to enforce payment of the money if he were required to give security for costs, and this might be the only means he had of paying his creditors.

Hutchinson in support of the rule was stopped.

PER CURIAM.—We think this is a case in which security for costs ought to be given. The plaintiff having executed an assignment to the provisional assignee of all his estate and effects, he no longer has a right personally to interfere in recovering this debt; and being insolvent, if he should fail in the action the defendant would have no remedy for his costs. We think that the plaintiff's assignee,

and if none has been chosen, some of his creditors should give security for costs before the action ought to proceed.

Rule absolute.

Exparte ALDRIDGE.

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The 3 Geo. 4. c. 110. makes it an offence for any person to be found carrying and conveying, &c. uncustomed brandy, and "upon the oath of one or more credible witness or witnesses," the offender is liable to be sent on board a King's ship, if he is fit and able to serve in the navy, and if not, to pay a pecuniary penalty. Where a conviction stated that R. A. was duly convicted before the Justice, of having been found "carrying and conveying" brandy liable to seizure, without stating that he had been convicted of that offence "upon the oath of a credible witness:" Held that the conviction was bad, and the defendant was discharged.

ON a former day a writ of habeas corpus issued to bring up *Robert Aldridge* from the gaol of the borough of *Hastings* in the county of *Kent*, for the purpose of being discharged, on the ground of a defective conviction under the 3 *Geo.* 4. c. 110. The gaoler now brought up the prisoner, and in his return to the writ set out a warrant of commitment founded on the following conviction, which had been removed by certiorari. "Be it remembered, that on &c. at, &c., *Robert Aldridge* hath been duly convicted before me, E. M. one of his Majesty's Justices of the Peace residing near the place where the offence was committed, of having, within three months last past, to wit, on, &c., at &c., (he the said *Robert Aldridge*, then and now being a subject of his present majesty,) been found carrying and conveying and assisting in carrying and conveying, contrary to the form of the statute in that case made and provided, divers, to wit, eight gallons of foreign brandy, then and there liable to forfeiture, under and by virtue of an act of parliament relating to the revenue of customs and excise in the United Kingdom, for that the said brandy, being goods liable to the payment of customs and other duties, had been then and there unshipped with intention to be laid on land, customs and other duties not being first paid or secured, contrary to the form of the statute, &c. And it is this day *in like manner proved*, on the oath of *Joseph Hancock*, to and before me the said Justice, that the said brandy was then and there, to wit, on &c., at &c., seized and taken from the said *Robert Aldridge*; and that he, the said *Robert Aldridge*, (being a subject of his said majesty

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as aforesaid, was then and there found, taken, stopped, arrested, and detained by one *J. G. F.*; he, the said *J. G. F.*, then and there being an officer of his Majesty's navy, and brought and carried before me the said justice, residing near to the place where the said *Robert Aldridge* was so found, taken, arrested and detained by the said *J. G. F.* as aforesaid; and that the said *Robert Aldridge* is not fit and able to serve in the navy; I do therefore adjudge, that the said *Robert Aldridge* hath, for such offence, forfeited the sum of 100*l.*, pursuant to the act passed in the third year of Geo. 4th, entitled, An Act, &c."

Platt now moved, that the defendant be discharged, on the ground that nothing was shewn on the face of the return to authorize his detention. By the statute the conviction can only take place upon confession, or upon the oath of one or more credible witness or witnesses. Now it does not appear that this conviction has taken place upon the oath of any witness, still less upon the oath of a credible witness. The conviction, it is true, begins by stating, that the prisoner "hath been duly convicted," but that is not sufficient. It must be shewn, that he has been duly convicted on the oath of a credible witness; but no witness whatever is mentioned from whose testimony it appears that the prisoner was found "carrying and conveying" the quantity of brandy mentioned, which is the offence, if any has been committed. There is nothing in the remaining part of the conviction to help this objection. The Justice goes on, "and it is this day *in like manner also proved, on the oath*," &c. Now there is nothing to which the words "in like manner" can refer, because there was nothing before stated to have been proved on oath, still less was the manner of the proof set out. The conviction says, that the defendant is convicted, but nothing appears to have been proved against him. The offence consists in being in possession of uncustomed brandy at a certain time, but there is no proof that he has been convicted of that offence.

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Shepherd, contrà. The statute 3 *Geo.* 4. c. 110.(a) gives a form of conviction, which though it has not been strictly pursued in this instance, still, upon the whole, it will be found that this conviction is sufficient both in form and substance. When the Justice begins by stating that the defendant has been duly convicted before him, the Court will reasonably intend that every requisite of the statute has been observed. Admitting that in that part of the conviction no mention is made of the description of proof by which the offence is substantiated, still what follows cures the defect. The first part of it is merely a description of the offence of which the defendant has been duly convicted, and then the Justice sets out the evidence whereon the conviction has proceeded. The words "in like manner" may be referrible to the words "hath been duly convicted," that is, "in like manner duly convicted on the oath of *Joseph Hancock*." It is manifest, upon taking the whole conviction together, that the offence was proved upon the oath of *Joseph Hancock*; and if that be so, then the conviction is right.

Abbott, C. J.—It is not stated on the face of this conviction to have been proved, *on oath*, that the defendant was found carrying and conveying the brandy in question, and that is the offence alleged against him. All that is said in the beginning of the conviction is, that he has been duly convicted. If the Justice had gone on and said, that it had been proved on oath that the defendant had been found carrying and conveying, it would have been sufficient. In-

(a) The form in the schedule to that statute is as follows: "Be it remembered, that on the — day of ——, in the year, &c. A. B. hath been duly convicted, before me, ——, one of his Majesty's justices of the peace, &c. of [*here state the offence*] by him the said A. B. committed against the provisions of the acts of parliament made and passed for the prevention of smuggling; which offence hath been duly proved before me, on the oath of one or more credible witnesses; and the said A. B. being a seafaring man, and fit and able to serve his Majesty in his navy, I do hereby adjudge the said A. B. to serve in his Majesty's naval service, pursuant to the act passed in the third year of King George the Fourth, intituled, &c. Given," &c.

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stead of which he states what had been proved. The mere statement that he hath been duly convicted, without shewing that the offence was proved on oath, is not sufficient, and I see nothing to which the words "in like manner" are referrible. It appears to me therefore that this conviction is bad, and the prisoner must be discharged.

Bayley, and Holroyd, Js., (a) concurred.

Discharged.

(a) *Best*, J., was absent.

Thursday, February 5.

Amory and Another *v.* Meryweather.

To an action of debt on bond, conditioned for the payment of 500*l.* by two instalments, defendant pleaded, "that he by his agent *W.* made unlawful contracts for the purchase and sale of shares in the public funds; that the contracts were not performed; but *W.* as agent for defendant voluntarily paid 500*l.* to compound the differences, against the form of the statute; that to secure to *W.* the repayment of that sum, defendant gave his promissory note to *W.*, which *W.* indorsed to plaintiffs long after it had become due; that plaintiffs afterwards threatened to sue defendant on the note, and that defendant in fear of that suit, and at the request of plaintiffs, gave the bond, which plaintiffs accepted in lieu of the note and the money thereby secured, they well knowing that the note had been given for the purpose and on the occasion in the plea mentioned." The evidence was that *W.* received the note as a security for money which he was at some future time to pay for stock-jobbing transactions; and that plaintiffs took the note after it was due, and had notice of the illegal consideration before the bond was given. Held, first, that the evidence did not support the plea which alleged that the note was given to secure the repayment of money already advanced by *W.*; and second, that as the note was taken after it was due, and the bond after notice of the illegal consideration, they were both equally void, and no action could be maintained on the latter; but liberty was given to the defendant to amend his plea on payment of costs, and to the plaintiffs to reply de novo.

THIS was an action of debt, upon a bond dated the 13th *May*, 1822, for 1,000*l.* The defendant, after craving oyer of the bond, which was conditioned for the payment of 500*l.* by two separate instalments, the first on the 13th *May*, 1823, pleaded, first, the general issue, non est factum. Second, that defendant, on the 18th *May*, 1817, by one *Matthew White*, being the agent and acting for and on behalf of defendant, made and entered into divers unlawful contracts and agreements with divers persons to defendant unknown for the purchase and sale of shares in the 3 per cent. stock to the amount of 10,000*l.*; that those contracts were not performed, but that *White*, as the agent and acting for and on behalf of defendant, afterwards voluntarily paid and gave

to the several persons with whom the contracts were made, the sum of 500*l.*, in satisfaction of the respective differences for the non-performance of the contracts by defendants, contrary to the form of the statute in that case made and provided; that defendant, *for securing to* White *the repayment* of 499*l.* 10*s.*, parcel of the sum of 500*l.* so voluntarily paid by *White*, and for no other purpose, on &c., at the request of *White*, made a promissory note, whereby he promised to pay, three months after the date thereof, to *White*, or his order, the sum of 499*l.* 10*s.*; that *White* indorsed the note to plaintiffs, *who well knew that the note had been made by defendant for the purpose and on the occasion aforesaid;* and that when the note became due, plaintiffs having threatened to sue defendant upon the note, defendant entered into the bond instead of the note and for payment of the money secured thereby. Third, after stating as before that the unlawful contracts were made, that *White* paid the sum of 500*l.* for the differences, and that defendant gave the note for securing the repayment of that sum to *White;* " that, before the payment of the said note, and long after the same had become due and payable, according to the tenor and effect thereof, to wit on 1st *January*, 1820, *White* indorsed the same to plaintiffs; that afterwards, to wit on 13th *May*, 1822, plaintiffs threatened to commence an action against defendant for the recovery of the said sum of money in the said note mentioned, and thereupon defendant, in fear of the said action, did, at the request of plaintiffs, make and seal, and as his act and deed deliver to plaintiffs the said writing obligatory in the said declaration mentioned, and plaintiffs received and accepted the same in lieu of the said last mentioned promissory note, and of the said sum of money so purporting to be secured thereby, including also therein the sum of 5*l.* 5*s.*, for the stamp impressed on the said writing obligatory and the costs thereof, and on no other account and for no other consideration whatsoever, plaintiffs then well knowing that the said promissory note had been made and drawn and delivered by defendant on the

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occasion and for the purpose in the plea mentioned, and on no other occasion or account whatsoever." Issue upon all the pleas. At the trial before *Abbott*, C. J., at the *London* adjourned Sittings after last *Easter* term, the execution of the bond being admitted, Mr. *White* was produced as a witness for the defendant. He stated that the promissory note was delivered to him as security for a sum of money which he had to pay, as the broker and agent of the defendant, for certain losses in stock-jobbing transactions, and that on the 16th *May*, 1819, being in want of money, he indorsed the note over to the plaintiffs, as a security for a loan of money then advanced by them to him, but that he did not then make known to them the consideration for which he had received it, though they were made acquainted with that circumstance previous to the execution of the bond. Upon this evidence the learned judge directed the Jury to find their verdict for the plaintiffs on the second plea, upon the ground, that no proof had been adduced in support of the averment in that plea, that the plaintiffs had notice of the illegal consideration for the note, at the time when it was indorsed over to them. His lordship was also inclined to think that the plaintiffs were entitled to a verdict upon the third plea, upon the ground of variance; the plea averring that the note was given to *White* to secure to him the repayment of the money advanced by him for compounding the differences, and the evidence shewing that the note was given previously to those differences being paid. It was, however, insisted by the defendant's counsel, that the third plea was sufficiently established by the evidence, and consequently a verdict was taken for the plaintiffs on the general issue, and on the first special plea, and for the defendant on the third plea, with leave for the plaintiffs to move to enter the verdict for them on all the issues, or, for judgment non obstante veredicto, upon the ground that the bond was a valid instrument, even if no action could have been sustained on the note; and a rule nisi having been obtained

in the alternative, accordingly, in the course of last *Trinity* term,

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Scarlett now shewed cause. If the third plea is supported by the evidence given at the trial, it is good, and the defendant is entitled to retain the verdict found for him, and to have judgment upon the whole record. The plea alleges that the bond was given in lieu of a promissory note, which was indorsed to the plaintiffs at a period when it was two years over-due, and consequently the defendant might set up as against these plaintiffs to an action upon the note, every defence which he would have had against the original holders of it. *Brown* v. *Turner* (*a*). The plea further alleges that the plaintiffs well knew the illegal consideration for which the note was given, before the bond was executed, and being holders of a promissory note, which they knew to be void by the 7 G. 2. c. 8., as being given to secure a sum of money paid to compound differences in stock-jobbing transactions, they accepted the bond in lieu of that note. But, under such circumstances, the provisions of the statute apply equally to the bond, as to the note, and *Cannan* v. *Bryce* (*b*), is an authority to shew that such a bond is void. That was an action by the assignees of a bankrupt, to whom the defendant had lent money for the purpose of stock-jobbing transactions, to recover from him certain sums paid by the bankrupt to the defendant in part liquidation of the loan. The defendant was no party to the stock-jobbing transactions, but it was held that the plaintiffs were entitled to recover, and it was said in the course of the judgment delivered by *Abbott*, C. J., "if the defendant acted unlawfully n lending his money to the bankrupts, he could not have sued them for recovery of payment; because no suit can be maintained upon an unlawful act: and if recovery could not be enforced at law upon the contract of lending, neither could recovery be enforced upon a bond given for the performance of the contract; the bond was not less void

(*a*) 7 T. R. 630. (*b*) 3 B. and A. 179.

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than the contract." Then, secondly, the evidence given at the trial was sufficient to support this plea. The plea set forth facts which sufficiently shewed that the plaintiffs had no title to recover, and the defendant did all that it was incumbent on him to do when he proved those facts in substance. When, indeed, a plaintiff sues upon a contract which he finds it necessary specially to set out upon the record, he can recover only upon that contract which he has set out, and therefore he must prove it to the letter; but it is not so where a defendant relies upon matters which are not specially stated. The allegations in the third plea amount in substance to no more than this, that the note was given for the settlement of differences on stock-jobbing transactions; and that was most fully proved. Whether it was proved in the precise technical language of the plea, or not, is perfectly immaterial; the plea would have been quite sufficient if it had merely alleged that the note was given for and in respect of the differences. Now that is in substance alleged by the plea, and that has in substance been proved; the plea therefore is good, and the defendant is entitled to judgment.

Copley, A. G., contrà. Undoubtedly this plea might be so arranged by the omission or alteration of certain parts of it, as to render it consistent with the evidence, and consequently good; but taken as it now appears upon the record, it contains allegations which have not been proved, and is therefore bad. Nothing can be plainer than the variance between the plea and the evidence; the former avers that *White* had paid the differences, and that the note was delivered to him for the purpose of securing to him the repayment of the money which he had so previously paid: the latter shewed, that the note was given to *White*, to secure to him the payment of money which he would at some future time be called upon to pay, but which he had not at the date of the note actually paid. But waiving this variance, and granting the plea to have been proved, the plain-

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tiffs must nevertheless have judgment non obstante veredicto. The plaintiffs took the note after it was due, but without any knowledge at that time of the illegality of the consideration; and therefore, though that illegality would have been a good answer to an action brought on the note, it is no answer to an action brought on the bond, which is a new security subsisting between parties untainted by the original and illegal contract. The present defence, in reference to the bond, comes too late. *George* v. *Stanley* (*a*). There the defendant gave bills for the amount of a gaming debt; and when they were due, he renewed them with the then holder, and for the last bills, when due, he confessed a judgment. The court would not set aside the judgment, unless he could affect the holder of the bills with notice, but permitted him to try that fact in an issue. [*Holroyd*, J. In this case the note was indorsed to the plaintiffs long after it was due; that fact gives birth to strong suspicion, and raises the inference that the plaintiffs were aware of the infirmity attaching to the title of the indorser, and if so, they took the note subject to every objection to which it had been previously liable in the hands of the indorser.] The principle contended for is also laid down in a case determined in this court; *Cuthbert* v. *Haley* (*b*); where it was held, that "If *A.* for an usurious consideration give his promissory note to *B.*, who transfers it to *C.*, for a valuable consideration without notice of the usury, and afterwards *A.* gives a bond to *C.* for the amount, the bond is good." That, therefore, is precisely the present case; there was a substituted security there, as here, and it was found that the plaintiff had no knowledge of the illegality of the consideration, which the present plaintiffs clearly had not at the time when they became indorsers of the note. On these grounds, it is, at least, clear that the plaintiffs are entitled to judgment non obstante veredicto.

ABBOTT, C. J.—The third plea is certainly not sup-

(*a*) 4 Taunt. 683. (*b*) 8 T. R. 390.

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ported by the evidence, but we are all of opinion, that the justice of the case will be best effected by giving the defendant liberty to amend that plea upon payment of costs. We are also of opinion that the plaintiffs are not entitled to judgment non obstante veredicto; but they will of course have leave to reply de novo when the defendant has amended his plea. The cases cited on the part of the plaintiffs are very distinguishable from the present. In the former it did not appear whether the plaintiff was or was not infected with privity to the gaming transaction, and therefore the court granted an issue to try that fact. In the latter, it was expressly found, that the plaintiff received the note for a valuable consideration, and without notice of the usury, and it was upon that ground held that the bond was good. Here it is in evidence that the plaintiffs knew of the illegal consideration when they received the bond, and that they took the note at an interval of two years after it was due; and therefore they never were in a situation to maintain an action upon the note. Now the bond was given in lieu of the note, and as the note was taken subject to an infirmity of title of which the plaintiffs were cognizant before the bond was executed, we are of opinion that the latter instrument is equally void with the former for which it was so substituted. This rule, therefore, must be discharged, the defendant having leave to amend his plea upon payment of costs, and the plaintiffs being at liberty to reply de novo (*a*).

BAYLEY, J.—The law says that a man who takes a note after it is due, takes it with all its infirmities, upon the presumption that he knows there is something wrong about it. The expedient resorted to, of changing the security, will make no difference if the original consideration be void.

HOLROYD, J.—Taking the note so long after it was due,

(*a*) Vide Tate v. Wellings, 3 T. R. 531. 2 Saund. 206. a. note 21. Camp. 445.

is a circumstance exciting strong suspicion, that the plaintiffs must have known that there was some infirmity in the note.

BEST, J.—If a party chuses with his eyes open to take a security of this nature, he must abide by all the consequences.

Scarlett elected to amend upon payment of costs at the suggestion of the Court.

FOX *v.* the Bishop of CHESTER, (in Error).

Monday, February 9.

A contract for the sale of the next presentation to a living, the incumbent being then afflicted with a mortal disease, with the knowledge of the parties, is simoniacal and void within the 31 *Eliz.* c. 6. though the purchaser has no intention of presenting any particular individual; & a clerk being presented by the purchaser, it was held that the presentation was void, although the clerk was not privy to the corrupt contract.

QUARE impedit. The first count of the declaration, after stating that the advowson of the rectory of the church of *Wilmslow* was appurtenant to the manor of *Bollyn*, and setting out the title of *Thomas Joseph Trafford* to the manor, with the appurtenances, for life, and shewing that *J. Bradshaw*, the last incumbent, was presented by virtue of a grant of the next avoidance made by *T. Trafford*, through whom *J. T. Trafford* claimed; proceeded thus: "and the said *J. T. Trafford* being so seised thereof, afterwards, to wit, on the 12th *November*, 1819, at &c., (the said church being then and there full of the said *J. Bradshaw*, the then incumbent thereof) by a certain indenture then and there made between *T. J. Trafford* of the one part, and plaintiff of the other part, (which plaintiff brings into court, &c.) he the said *T. J. Trafford*, for the consideration therein mentioned, did grant, bargain, sell, and demise unto plaintiff, his executors, &c., all that the said advowson, donation, right of patronage, presentation, and free disposition of, in, and to the said rectory and parish church of *Wilmslow*, in the county palatine of *Chester*, with the rights, members, and appurtenances thereunto belonging; to have &c. to plaintiff, his executors, &c., for ninety-nine years, if the said *T.*

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J. Trafford should so long live. By virtue of which said last mentioned indenture, plaintiff then and there became and was possessed of the said advowson, &c., of and in the said rectory, &c., as in gross, by itself, for the said term so to him thereof granted." It then averred that *T. J. Trafford* is still living, and that after the making of the indenture, and while plaintiff was possessed of the advowson, to wit on &c., the church became vacant by the death of *J. Bradshaw*, the last incumbent thereof, whereby it then belonged, and still belongs to plaintiff, to present a fit person to the church, being so vacant, but the said bishop unjustly hinders him, &c. The second count was precisely like the first, except that it set out a title to the advowson in gross, and made no mention of the manor. The defendant craved oyer of the indenture made between plaintiff and *Trafford*, by which it was witnessed, that, in consideration of 6000*l*. paid by plaintiff to *Trafford*, the latter had granted, &c., and by the indenture did grant, &c., all that the advowson, &c., of, in, and to the rectory, &c., with the rights, &c., for ninety-nine years, if *Trafford* should so long live. Covenant by *Trafford* that he had good right to grant the advowson, and that he would indemnify plaintiff against all manner of right, title, claim, and demand, whatsoever, which the chancellor and scholars of the university of *Cambridge* might have or claim, in the advowson, during the said term of ninety-nine years, and against all right, &c., which any person thereafter presented or nominated to the church by the said chancellor and scholars, might have or claim thereto, by virtue or color of such presentation or nomination, and against all costs and expenses which plaintiff might be put to by reason of any such title or claim. Then, covenant for further assurance, with this proviso: "Provided always, and it is hereby declared and agreed, by and between the said parties hereto, that when and as soon as plaintiff, his executors, &c., shall have presented to the said rectory or church of *Wilmslow*, by reason of the same having become vacant or void by the death, resigna-



tion, deprivation, eviction, promotion, or cession, of *J. Bradshaw*, the present incumbent, or otherwise, or through the wilful neglect or default of plaintiff, his executors, &c., the said rectory or church shall have been suffered, as to the presentation, or right of presentation thereto, to lapse, plaintiff, his executors, &c., shall and will, at any time or times thereafter, at the request and proper costs and charges of *Trafford*, or such person as he shall appoint, re-assign the said advowson to *Trafford*, or such person as aforesaid, for all the residue which shall be then unexpired of the said term of ninety-nine years, free from all incumbrances, by plaintiff his executors, &c." Defendant then craved oyer of the indenture in the second count mentioned; which was averred to be in the same words as the indenture in the first count mentioned, and therefore was not set out, and then pleaded that *Trafford* did not grant the advowson to plaintiff, modo et formâ, concluding to the country. The like plea to the second count. Third plea to both counts averred that the indenture in the first count, and the indenture in the second count, was one and the same, and then stated that the indenture was made *after* the church became vacant by the death of *Bradshaw;* and that *Trafford, after* the church became vacant, granted the advowson to plaintiff, traversing the grant by *Trafford* to plaintiff while the church was full of *Bradshaw*, and concluding with a verification. Fourth plea commenced with an averment of the identity of the church, the advowson, the indenture made between *Trafford* and plaintiff, and the disturbance by defendant, in both the counts mentioned, and proceeded thus: "And the said bishop further saith, that the said church of *Wilmslow* is within his diocese of *Chester*, and a benefice with cure of souls; and that while the said *J. T. Trafford* was so seised of the said manor, to which, &c. with the appurtenances, and of the said advowson, as in the said declaration mentioned, and before the making of the corrupt, simoniacal, and unlawful agreement in this plea after mentioned, to wit, on 11th *November*, 1819, the said *J. Bradshaw*, then being

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the incumbent of and filling the said church, was afflicted with a mortal disease, so that he was then in extreme danger of his life, and his life was thereby then despaired of, to wit, at &c.; whereof as well plaintiff and *J. T. Trafford*, as one *George Uppleby*, clerk, in this plea after mentioned, to wit, on &c., and also at the time of making the corrupt &c. agreement, in this plea after mentioned, there had notice. And the said bishop further saith, that while the said *J. T. Trafford* was so seised, &c.; and while the said *J. Bradshaw*, so being the incumbent, &c. was so afflicted, and in such danger, &c. to wit, on &c. at &c. they the said *J. T. Trafford*, plaintiff, and *G. Uppleby*, and each of them, then and there well knowing the premises, and believing and expecting that the death of the said *J. Bradshaw*, of the mortal disease aforesaid, was then and there fast approaching; and that by means of the death of the said *J. Bradshaw*, the said church would forthwith become vacant; it was in such belief and expectation corruptly, &c. and against the form of the statute, &c. agreed by and between the said *J. T. Trafford* and plaintiff, with the knowledge of the said *G. Uppleby*, that plaintiff should pay to the said *J. T. Trafford* the sum of 6,000*l*. and that the said *J. T. Trafford*, in consideration thereof, should grant, &c. to plaintiff the next presentation to the said church; *and that, in order to make such grant, &c. and as a means of making such grant, &c. to plaintiff, of the next presentation, &c. and as a shift, contrivance, and device, to evade and elude the making such grant, &c. as a mere grant, &c. to plaintiff, of the next presentation to the said church, in express terms,* **the said indenture, in the said declaration mentioned to have been made between the said J. T. Trafford and plaintiff, should be made, and that the said J. T. Trafford should seal, and as his act and deed deliver, the said indenture.* And the said bishop further saith, that afterwards, and while the said *J. T. Trafford* was so seised, &c. and while the said *J. Bradshaw*, so being the incumbent, &c. was so afflicted, and in such danger, &c. to wit, on 12th

November, 1819, to wit, at &c. in pursuance, furtherance, and performance of the said corrupt, &c. agreement, and in order to make such grant, &c. of the next presentation, &c. *and as a means of making such grant, &c. by the said J. T. Trafford to plaintiff of the next presentation, &c. and as a shift, &c. to evade, &c. the making such grant, &c. as a mere grant, &c. to plaintiff, of the next presentation, &c. in express terms*, the said indenture, &c. was made, and the said *J. T. Trafford* did then and there seal, &c. the said indenture. And the said bishop further saith, that the said *J. Bradshaw*, so being the incumbent, &c. remained and continued so afflicted as aforesaid, and in such danger, &c. as aforesaid, from the time in that respect in this plea above-mentioned, until the time of his death; and that afterwards, to wit, on 12th *November*, 1819, the said *J. Bradshaw*, so being the incumbent, &c., of the disease aforesaid died, to wit, at &c.; and by means thereof the said church then and there became and was vacant. And the said bishop further saith, that by reason of the premises, and by force of the statute, &c. the said last-mentioned indenture became, and was, and is, utterly void, frustrate, and of no effect in law, and wholly inoperative to grant, pass, or convey, any estate, right, title, or interest, in the said advowson, or any presentation, or any right of presentation to the said church, to plaintiff. And the said bishop further saith, that afterwards, to wit, on 30th *December*, 1819, at &c. plaintiff, under color, and by pretence and means of the said last-mentioned indenture, so made as aforesaid, in pursuance of the said corrupt, &c. agreement, did corruptly, &c. and against the form of the statute, &c. present the said *G. Uppleby*, clerk, to the said bishop, to be admitted, instituted, and inducted, into the said church, to wit, at &c. But the said bishop further saith, that by reason of the premises, and by force of the statute, &c. the said presentation of the said *G. Uppleby* by plaintiff, so made as aforesaid, became, and was, and is, utterly void, frustrate, and of no effect in law; and the said bishop, by reason thereof, did not, nor could admit, &c. nor by law

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ought to have admitted, &c. nor yet by law ought to admit, the said *G. Uppleby* into the said church, upon, or by virtue of that presentation, which is the same hinderance and disturbance, &c. whereof plaintiff hath above complained. Fifth plea, like the fourth, only omitting the parts printed in italics. Sixth plea, also like the fourth, only omitting the allegation that the simoniacal contract was made with the knowledge of *G. Uppleby*. Seventh plea, like the fifth, with the same variation. Eighth plea, omitting all mention of *G. Uppleby*, but in other respects like the fourth, except as to the agreement, which was stated to be, "That in consideration of the sum of 6,000*l.* to be therefore paid by plaintiff to the said *J. T. Trafford*, the said indenture, in the said first count, &c. mentioned to have been made, &c. should be made, and that the said *J. T. Trafford* should seal, &c. the said indenture. And the said bishop further saith, that afterwards, and while the said *J. T. Trafford* was so seised, &c. and while the said *J. Bradshaw*, so being incumbent, &c. was so afflicted, &c. to wit, on 12th *November*, 1819, at &c. in furtherance &c. of the said corrupt &c. agreement, the said indenture, in the said first count, &c. mentioned to have been made, &c. was made; and the said *J. T. Trafford* did seal, &c. the said indenture." Ninth plea, stating the agreement to be, that *J. T. Trafford* should, "in consideration of money, grant, &c. to plaintiff the next presentation to the said church," averring the indenture to have been made in pursuance of that agreement, and concluding like the eighth. Tenth plea, "that plaintiff, intending to present the said *G. Uppleby* to be admitted, &c. into the said church, when the same should, by the death of the said *J. Bradshaw*, next become vacant, it was then and there corruptly &c. agreed, &c. that plaintiff should pay to the said *J. T. Trafford* the sum of 6,000*l.* and that the said *J. T. Trafford*, in consideration thereof, should grant, &c. to plaintiff, the next presentation to the said church, plaintiff then and there intending to present the said *G. Uppleby* thereto;" then averring that, in order

to make the said grant of the next presentation, the indenture was made and sealed, &c. by the said *J. T. Trafford*, and was accepted and received by plaintiff, with intent to present the said *G. Uppleby*. Eleventh plea, stating a corrupt agreement between plaintiff and the said *J. T. Trafford* that the indenture should be made, and averring that it was made in pursuance thereof. Twelfth plea, the same, only omitting the averment that plaintiff and *J. T. Trafford* knew of the dangerous illness of *J. Bradshaw*. Thirteenth plea, the same, only omitting all mention of *J. Bradshaw*. Fourteenth plea, an agreement between plaintiff and *J. T. Trafford*, after the death of *J. Bradshaw*, and after the church became vacant, that in consideration of 6,000*l*. *Trafford* should sell the next presentation to plaintiff, averring that the indenture was made in pursuance of that agreement. Fifteenth plea the same, only omitting the agreement to sell the next presentation. Replications; to the first and second pleas, similiters. To the third, that, while the church was full of the said *J. Bradshaw*, the incumbent thereof, the said *J. T. Trafford*, did grant, &c. the advowson, &c. to plaintiff. To the fourth, that it was not corruptly, &c. agreed, &c. between plaintiff and the said *J. T. Trafford*, with the knowledge of the said *G. Uppleby*, modo et formâ. To the fifth, the same, and to all the other pleas similar replications, traversing the corrupt agreement modo et formâ. At the trial, before *Warren*, C. J. of *Chester*, and *Marshall*, Serjt. at the *Chester Lent* Assizes, 1821, the jury found a special verdict to the following effect: That the matters comprised in both the counts of the declaration were identically one and the same matters. That *J. T. Trafford*, before and on the 12th *November*, 1819, was seised of the manor and the advowson within mentioned, and that *J. Brasdhaw*, before and on the 12th November, 1819, was the incumbent of the church of *Wilmslow*, and that the said church was then full of the said *J. Bradshaw*: that *J. Bradshaw*, so being the incumbent of and filling the said church, was before and on the 12th *November*,

1819, afflicted with a mortal disease, so that he was then in extreme danger of his life, and his life was thereby then greatly despaired of; that he continued so afflicted with such mortal disease, and in extreme danger of his life, and his life was and continued to be greatly despaired of until the time of his death; and that he, so being such incumbent, died of the said mortal disease at half-past eleven o'clock at night of the 12th *November*, 1819. That at ten minutes before three o'clock in the afternoon of the same 12th *November*, 1819, and while *J. Bradshaw* was such incumbent, an agreement was made and concluded between *J. T. Trafford*, so being seised of the said manor and advowson, and plaintiff, for the sale by *J. T. Trafford* to plaintiff, of the next turn or presentation of the said church, for and in consideration of 6,000*l*. That immediately after the making of such agreement, on the same 12th *November*, 1819, *J. T. Trafford* and plaintiff, in pursuance of such agreement, and in order to carry the same into effect, and as an expedient to convey the next presentation alone, sealed and delivered the within-mentioned indenture, bearing date 12th *November*, 1819, and of which said indenture the said bishop has within had oyer, and which is within set forth upon such oyer thereof. That the said agreement was made, and the said indenture sealed and delivered, in the lifetime of *J. Bradshaw*, and he, at the time of making the said agreement, and of sealing and delivering the said indenture, was afflicted with the said mortal disease, and in extreme danger of his life, and his life was thereby then greatly despaired of; and that *J. T. Trafford* and plaintiff, at the time of making the said agreement, and of sealing and delivering the said indenture, well knew and believed that the said *J. Bradshaw* was afflicted with the said mortal disease, and in extreme danger of his life, and that his life was thereby then greatly despaired of; and that the said agreement was made, and the said indenture sealed and delivered, without any knowledge or privity whatsoever of the said *G. Uppleby*, and without any intention to present

the said *G. Uppleby* to the said church when it should become vacant. But whether or not, upon the whole matters aforesaid, by the jurors aforesaid, in form aforesaid found, the said *J. T. Trafford* did grant, &c. unto plaintiff, his executors, &c. the advowson, &c. of, in, and to the within-named church, with the rights, &c. thereunto belonging, in manner and form as plaintiff hath in the first and last counts of the declaration, or in either of them, in that behalf alleged, or in manner and form as is stated in the oyer of the said indenture set forth, the jurors aforesaid are wholly ignorant. And whether or not, upon the whole matters aforesaid, the said *J. T. Trafford*, while the said church was full of the said *J. Bradshaw*, he being the incumbent thereof, did grant, &c. the jurors aforesaid are wholly ignorant. And whether or not, upon the whole matters aforesaid, it was corruptly, simoniacally, and unlawfully, and against the form of the statute in such case made and provided, agreed by and between *J. T. Trafford* and plaintiff, in manner and form as defendant hath above in his within-mentioned fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, and fifteenth pleas, or any of them, alleged, the jurors aforesaid are wholly ignorant, and thereupon they pray the advice, &c. concluding in the ordinary form. Judgment being given for the defendant upon the special verdict, in the inferior court, the plaintiff brought error.

Parke, for the plaintiff in error. The question in this case is, whether a contract for the sale of the next presentation of a living, the incumbent being in extremis, but the purchaser having no intention to present any particular individual, is, or is not, simoniacal. The plaintiff certainly contends that such a contract is not simoniacal, and the argument is supported as well by principle as by authorities. *Barrett* v. *Glubb* (a) is directly in point, where it was held, that " on the purchase of an advowson in fee, the incum-

(a) 2 Sir W. Bl. 1052. Bac. Abr. Simony. A.

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bent being in extremis, but without any privity of the clerk, the next presentation is not void, as being upon a simoniacal contract;" and where *De Grey*, C. J. said, "the church is not actually void, but in great probability of a vacancy; which however is by no means equivalent to a certainty. We should go beyond every resolution of our predecessors, to determine this to be simony." The principle and propriety of that decision were very fully considered in *Greenwood* v. *The Bishop* of *London* (a), and nothing was said, either there, or in any subsequent case, to invalidate its authority. [*Bayley*, J. Is it known what was the result of *Barrett* v. *Glubb*, and whether the Court of Chancery acted upon the certificate sent by the Court of Common Pleas?] That is not known with certainty, but as the case has been reported by Mr. Dickens (b) as a decision of the Court of Chancery, it would certainly appear that it had been adopted as such. The effect of that decision is, that all future presentations passed by the contract, because the advowson consists in fact of all the future presentations, and surely, if the next presentation passes when coupled with others, it must equally pass alone. The present case is not within the scope of 31 *Eliz.* c. 6. s. 5. The object of that statute was to prevent the patron from acquiring any personal benefit or profit by his selection of the presentee; but as the patron may lawfully be changed, any portion of the patronage may, while the church is full, lawfully be sold; and under such circumstances it cannot be said that the new patron acquires any benefit by presenting, for he is within the rule laid down by Lord *Coke* (c), "that a fit person for the discharge of the cure should be presented freely, without expectation of any thing." [*Bayley*, J. By 12 *Ann.* c. 2. s. 12., he who buys, or procures to be bought, in his own name, or that of another, the next presentation, cannot present, nor be presented, to the church.] All the cases in which the sale of a next presentation has been held

(a) 5 Taunt. 727. 1 Marsh, 292. S. C.

(b) 2 Dickens, 516.

(c) Co. Litt. 17 b.

illegal, are to be found in *Watson's* Complete Incumbent (*a*), and they are all mainly distinguishable from the present, for they all contain one or other of these ingredients; either, a fraudulent presentation, as a mode of concealing a simoniacal contract; or, a purchase directly by the clerk himself; or, a purchase with an intention to present some particular individual. In *Winchcombe* v. *Pulleston* (*b*) the next presentation was conveyed to the new patron, as a cloak for a simoniacal contract previously made between him and the clerk, whom he afterwards presented. In *Kitchin* v. *Calvert* (*c*) it was said by *Snigg*, B., "That if *A.* doth buy the next avoidance, with an intent to present *B.*, and the church becoming void, *A.* doth present *B.* accordingly, this is simony. By averment, and by good pleading, the presentment of *B.* shall be void." It follows, therefore, from that case, that the contract is not illegal, except when it appears, on the face of the record, that it was made with an intention to present some particular individual; and it is to be observed also, that the contract there was made after the church had actually become vacant. But here, the special verdict finds expressly that *Uppleby* was no party to the arrangement, and that the plaintiff did not enter into it with any view of presenting him as the Clerk. The right of presentation is a valuable right; it is an estate, and as such is capable of transfer, so long as there is no corrupt motive mixed up with the contract, and while the church is actually full. Here, the church was full when the contract was made. The only criterion on this point is the life of the incumbent, for so long as he is actually alive, however near he may probably be to death, so long the church is full, but from the moment of his decease, the church is void, and the right cannot be conveyed. This church was in fact full, and the Court will confine itself to that point, and will not enter into nice questions of probability. In *Brooksbie's* case (*d*) it was held that the grant of a pre-

(*a*) 32.
(*b*) Noy, 25. Hob. 165. S.C.
(*c*) Lane, 102.
(*d*) Cro. Eliz. 173. 1 Leon. 167. 3 Leon. 256. Dyer, 282, in margin, S. C.

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sentation after the church became vacant, was void, "for after the avoidance it is merely a thing in action, and so annexed to the person, that it cannot be granted or released." *Agar* v. *The Bishop of Peterborough* (*a*), and many other cases, may be cited to the same point, and serve to explain the decision in the case of *Baker* v. *Rogers* (*b*). In that case the contract for the next presentation was made after the church had become vacant, and it was held, that as the sale of it would have been illegal, the presentation by the purchaser was, by construction of law, a presentation by the owner, and was clearly simoniacal, because the latter had received a sum of money for it. In *Walker* v. *Hammersley* (*c*) there was a sale of the advowson, with a covenant to present a particular person, the church being then full of an incumbent by occupation; and it was held to be simony, because by construction of law the church was vacant at the time of the sale. The circumstances of this case shew that it is not within the terms of the 31 *Eliz.* c. 6., and if so, it does not come under the jurisdiction of this Court, for, as Lord *Holt* said in *The Bishop of St. David's* v. *Lucy* (*d*), "the common law takes no notice of any *simony*, but that which the statute mentions;" and he afterwards adds, "there is not a word of *simony* in the statute of *Elizabeth*, but of buying and selling." *Smith* v. *Shelburne* (*e*) has decided, that the purchase of the next presentation, where the incumbent is in extremis, is not simoniacal. [*Best*, J. That case was decided entirely upon the principle that the purchase was made by a father for his son, which it was there assumed might legally be done; but that has been since doubted, if not expressly over-ruled. (*f*)] The propriety of the decision certainly was doubted at the time by *Anderson*, C. J., but that was upon the ground that the son was privy to the contract; and that appears to be the real

(*a*) Dyer, 129.
(*b*) Cro. Eliz. 788. Moor. 914. S. C.
(*c*) Skinner, 90. 3 Lev. 115. S. C.
(*d*) 1 Ld. Rd. 447. 12 Mod. 237. S. C.
(*e*) Cro. Eliz. 685.
(*f*) Vide Moor, 916. S. C. *Booth* v. *Potter*, Cro. Jac. 533.

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objection that has since been taken to the case, for it is cited by Lord Chief Baron *Comyns* (*a*) as a contract to which the clerk himself was a party. In *Sheldon* v. *Brett* (*b*) it is said by *Hutton*, J. "We, in Chancery, have adjudged, that the grant of the next avoidance for money, where the parson was sick in his bed, ready to die, is simony: for the statute is, if the contract be made directly, or indirectly, by any way or means." But that also must have been the case of a contract made with the knowledge of the clerk, for *De Grey*, C. J. so describes it in his judgment in the case of *Barrett* v. *Glubb* (*c*). The result, therefore, most clearly is, that by the common law the patron may sell his patronage or any portion of it, at any time while the church is full, though he never can when the church is vacant; and, that no single case can be found which has decided that the sale of patronage while the church is full is made void by the statute; provided the contract be made without an intention by the purchaser to present any particular clerk, and provided the clerk himself be not privy to, or party in, the contract. At common law, therefore, the present transaction would undoubtedly be valid and legal, and as the special verdict expressly negatives the only two circumstances which could render it void by the 31 *Eliz.* c. 6., it is equally plain that it is good by the statute law. Upon these grounds the plaintiff in error is entitled to judgment.

D. F. Jones, contrà. Many of the cases already cited may be dismissed without further examination, because in some of them the purchase was made, either by the clerk himself, or with his knowledge, and in others the fact of the incumbent being in extremis was unknown to the contracting parties; circumstances which essentially distinguish them all from the present case. This is a grant of a next presentation, made for money, the parties knowing that the incumbent was in extremis, but the clerk not being a party

(*a*) Com. Dig. Esglise, (N. 3.)
(*b*) Winch. 63.
(*c*) 2 Sir Wm. Bl. 1052.

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in, or privy to, the contract; and the short question is, whether such a grant is good. The church, though de facto full, was, by construction of law, vacant, and therefore, according to some of the authorities already quoted, the thing sold was a mere chose in action, and could not be the subject of grant. In order to render the sale of an advowson or a presentation good, it must appear, that the purchase has been made with an intention to acquire a property in the thing sold; and it has been so held in every known case upon the subject. It was in very early times determined that the sale of an advowson, made while the church was vacant, was void as respects the next presentation. *Jenk. Cent.* (a) *Stephens* v. *Wall* (b). It has been held void even in a case where no money was paid, upon the ground of public policy; *The Bishop* of *Lincoln* v. *Wolforstan* (c), where it is said by Lord *Mansfield*, and by *Wilmot*, J., "that the true reason why a grant of a fallen presentation, or of the avoidance of an advowson, is not good, quoad the fallen vacancy, is the public utility, and the better to guard against simony; not for the fictitious reason of its being then become a chose in action." Thus the only remaining question is, whether any difference is produced by the fact here found, that the person presented was in no manner privy to the transaction. Now, *Baker* v. *Rogers* (d) has certainly decided that such a grant is void, even though made without the privity of the clerk; though it has been held that under such circumstances the clerk is not liable to the penalties imposed by the act of parliament. 3 *Inst.* 154., and Dr. *Hutchinson*'s Case (e). This, however, was a sale of the next presentation only, and not of the advowson, in which respect the case is distinguishable from that of *Barrett* v. *Glubb* (f). Here the incumbent was at the point of death, as the contracting parties well

(a) 236 Ca. 13.
(b) Dyer, 282. b. 1 Ander. 15. S.C.
(c) 3 Burr. 1504.
(d) Cro. Eliz. 788. Moor, 914. S.C.
(e) 12 Rep. 101.
(f) 2 Sir W. Bl. 1052.

knew, and actually died only six hours after the bargain was made. To hold such a contract good, would be utterly to defeat the policy of the law, which is to prevent even the risk of a simoniacal presentation, and in furtherance of which it has been held that the purchase of a next presentation, in order to the nomination of a particular clerk, is void. *Kitchin* v. *Calvert* (*a*). *Sheldon* v. *Brett* (*b*) decided, "that the grant of the next avoidance for money, where the parson was sick in his bed, ready to die, is simony;" and though *De Grey*, C. J. in *Barrett* v. *Glubb* (*c*), assumes that the clerk in that case was privy to the contract, there is nothing in the report to justify the supposition. So, "where the father of the incumbent contracted with the patron's wife to give her 100*l.* if the patron would present his son, the patron or incumbent not knowing of this contract, yet this was held to be within the statute;" *Calver's* case, cited in *Bawderok* v. *Mackaller* (*d*), which is a sufficient answer to the case of *Smith* v. *Shelburne* (*e*) cited on the other side. A right of next presentation is not deemed to be profits, so as to call upon the party to account. Upon this principle it has been held, that a guardian in socage, or by nurture, cannot present to a church in the name of the heir, because he cannot account for it; 1 Inst. 17. b. 88. a. 3 Inst. 156. The like has been held with respect to a mortgage, in *Amhurst* v. *Dawlings* (*f*), where the Court said, "the mortgagee can make no profit by presenting to the church, nor can account for any value in respect thereof, to sink or lessen his debt, and the mortgagee therefore in that case, until a foreclosure, is but in the nature of a trustee for the mortgagor." The only authority which bears against the defendant, is *Barrett* v. *Glubb* (*c*), and that varies from the present, inasmuch as there the advowson was the subject of the sale, and the length of the negociation between the parties went to shew that the thing sought to

(*a*) Lane, 102.
(*b*) Winch, 63.
(*c*) 2 Sir W. Bl. 1052.
(*d*) Cro. Car. 330.
(*e*) Cro. Eliz. 685.
(*f*) 2 Vernon, 401.

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be acquired was the property in the advowson, and not merely the early right of nomination to the next turn. Many cases have decided that the statute 31 *Eliz.* c. 6., though penal, ought to receive a liberal construction, without which the object of the legislature must be defeated, and public policy evaded. This contract was made with a view to the immediate right of presentation, and as such it was a fraud upon the policy of the law, and consequently void. For these reasons the judgment of the Court below must be affirmed.

Parke, in reply. That this contract might have been void either by the common law, or the canon law, it is not necessary to dispute, because the question now is, whether it is void by the statute of *Elizabeth*. " Simony, as such," said *De Grey*, C. J. in *Barrett* v. *Glubb* (*a*), " was unknown to the common law, though I agree that corrupt presentation was. But what is, or is not, simony, now depends on the statute of the 31 *Eliz.* c. 6., which did not adopt all the wild notions of the canon law; but has defined it to be a corrupt agreement to present." It is said that the transaction in this case is a fraud upon the policy of the statute; but as the object of the statute is, as it was also of the common law, to have a fit person presented, the mischief intended to be prevented does not occur, unless a corrupt knowledge and participation in the contract be shewn to exist in the clerk himself. Now there is no evidence of that kind in this case, and even if there had been, that would properly have been for the consideration of the jury as a matter of fact, and cannot come before the Court as a matter of law. It is said in *Byrte* v. *Manning* (*b*), " without special averment, or shewing, that it was a simoniacal contract, it shall not be so intended," and upon that principle the Court will act here. There is no special averment or shewing of fraud in this case, and therefore the Court will not presume that any fraud was intended.

(*a*) 2 Sir W. Bl. 1052. (*b*) Cro. Car. 425.

The case was argued in the course of last *Trinity* Term, when the Court took time to consider of its judgment, which was now delivered by

ABBOTT, C. J.—We are of opinion that the judgment of the Court below in this case must be affirmed, and our opinion is founded upon the language of the statute 31 *Eliz.* c. 6., and the established principle of law, that the provisions of an act of parliament shall not be eluded by shift or contrivance. The cases cited in argument are to a certain degree contradictory, and it is by no means an easy task to make them reconcileable. The decision mentioned by *Hutton*, J. in *Sheldon* v. *Brett* (a), would probably prove a strong authority in favour of the present defendant, if we were acquainted with all the circumstances of the case; but unfortunately we are not: and it is opposed by the case of *Barrett* v. *Glubb* (b), in which undoubtedly the opinion of four very learned judges is expressed in favour of the validity of the sale of a next presentation, made where the early decease of the incumbent is anticipated. That case, however, does not appear to have been acted upon by the Lord Chancellor, and therefore we do not consider it altogether as a judicial authority. Upon referring to the entry of the decree in the Register Book, we find that his Lordship decreed a conveyance of the advowson, and awarded costs to the plaintiffs, the purchaser and his clerk; but he made no decree to restrain the seller from prosecuting his quare impedit. Now this we think he would have done, if he had thought that the presentation passed to the purchaser, for the seller certainly must succeed in the quare impedit, because the advowson had not been actually transferred before the church became vacant, but only contracted for: and if the Lord Chancellor had thought that the presentation passed to the purchaser, he would have imposed upon the seller the condition of presenting the purchaser's nominee, as in

(a) Winch, 63. (b) 2 Sir W. Bl. 1052.

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the case of a mortgage, for by that course only could that nominee be entitled to be instituted to the church. In addition to this it appears, both by the register book and by the report of the case in *Dickens*, that there was a negociation of some length before the purchase of the advowson was finally arranged, and that the dangerous state of the incumbent was unknown to the seller, at the time when the bargain was made: but the fact of the previous negociation was not introduced into the case sent by the Lord Chancellor to the Court of Common Pleas. The special verdict in this case does not find the fact of any previous negociation; the only facts found, are, the contract of the 12th of *November*, 1819, and the transfer of the same date. We cannot presume any thing which we do not find in the special verdict, and therefore we have merely to examine the facts with which we are furnished, and the language of the statute of *Elizabeth*, with relation to each other. The preamble to the fifth section, which has somewhat irregularly found a place at the close of the fourth, states, that the statute was made for the avoiding of simony and corruption in presentations to benefices, &c. and the fifth section enacts, "that if any person or persons, &c. shall or do at any time for any sum of money, &c. directly or indirectly, or for or by reason of any promise, &c. of or for any sum of money, &c. directly or indirectly present or collate any person to any benefice with cure of souls, &c. or give or bestow the same for or in respect of any such corrupt cause or consideration; that then every such presentation, &c. shall be utterly void, frustrate, and of none effect in law, and the Queen's Majesty, her heirs, &c. to present, &c. for that one time or turn only." Now, it is a proposition equally consistent with sound reason and law, that he who enables another to do an act, which without such enabling the other could not do, himself, indirectly at least, if not directly, does that act. Then, what are the facts of this case? On the 12th of *November*, 1819, *Bradshaw* was afflicted with a mortal disease, so that he was then in ex-

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treme danger of his life, and his life was thereby then greatly despaired of; he continued to be so afflicted with such mortal disease, and in extreme danger of his life, and his life was and continued to be so greatly despaired of until the time of his death; and he died on the same 12th of *November*, about half after eleven at night. On the same 12th of *November*, about ten minutes after three in the afternoon, an agreement was made and concluded between *Trafford*, who was then seised of the advowson for his life, and the plaintiff, for the sale by *Trafford* to the plaintiff, of the next presentation, in consideration of £6,000. On the same 12th of *November*, and immediately after making that agreement, *Trafford* and the plaintiff, in pursuance of the agreement, and as an expedient to carry it into effect, and to convey the next presentation alone, executed the deed of which the defendant has had oyer, (being that on which the title of the plaintiff is founded,) and which purports to be a conveyance of the advowson by *Trafford* to the plaintiff and his executors for ninety-nine years, if *Trafford* shall so long live. At the time of making the agreement, and executing the deed, *Bradshaw*, the incumbent, was afflicted with the said mortal disease, and in extreme danger of his life, and his life thereby then greatly despaired of; and *Trafford* and the plaintiff, at the time of making the agreement, and executing the deed, well knew and believed that *Bradshaw* was afflicted with the said mortal disease, and was in great danger of his life, and that his life was thereby then greatly despaired of. Such is the finding of the jury, which agrees precisely with the allegations in the seventh and some other pleas, and though it differs from those in the sixth plea, by substituting a general knowledge and belief, for a knowledge of the deceased, the danger and the despair of life, and a *belief that death was fast approaching*, the variation cannot be regarded as material. Can it be contended, that an agreement for the sale of a next presentation, made when the incumbent is, and is known to be, at the point of death, followed up by a deed purporting to be

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a conveyance, not, like the agreement, of a next presentation, but of a term likely to comprehend several presentations, though intended to convey the next only, is not a plain evasion of the provisions of the act of parliament, and an indirect presentation by the seller, of the clerk of the purchaser? If it is an evasion of the act of parliament, it must necessarily be void upon general principles, according to the construction of law suggested by Lord *Hardwicke* in *Grey* v. *Hesketh* (*a*), and by the established doctrine of the bankrupt laws, that a voluntary payment made by a man in contemplation of bankruptcy to one creditor, for the purpose of favouring that creditor to the prejudice of the rest, is an evasion of that rateable distribution for which those laws provide, and therefore void, and the money recoverable by the assignees. We are, however, of opinion, that the presentation made under such circumstances is, indirectly, a presentation by the seller. It is, indeed, found, that the agreement was made, and the deed executed without the intervention or privity of the person afterwards presented by the plaintiff, and without any previous intention on his part to present that particular person when the church should become vacant. But several of the cases quoted in argument, and especially that of *Baker* v. *Rogers* (*b*), shew, that the privity of the clerk is not a necessary feature to constitute a corrupt and simoniacal contract. There, the next presentation was purchased for money the next day after the church became vacant, and the contract was held to be void, because it was a fruit fallen, and a chose in action, not assignable; the presentation also was held to be simoniacal, although the person presented by the purchaser had no knowledge of the transaction till after he had been inducted. Nor is an intention to present a particular individual a necessary feature; the plaintiff may have intended to present some other person, who, becoming acquainted with the character of the transaction, might choose to decline the presentation; or may have intended to select some person

(*a*) Ambler. 268. (*b*) Cro. Eliz. 708.

from out of a class of men distinguished by particular habits, doctrines, or tenets, or to indulge his liberality by bestowing a valuable appointment upon some person selected on account of his piety and learning. But no one of these intentions would alter the character of the transaction itself; the transaction may be unlawful, though the use for which it is designed may be innocent, or even laudable: it is, as was said in one report of *Baker* v. *Rogers* (*a*), the contract that makes the simony. Then, if this is, in substance, which it appears to us to be, a contract for money, that *Trafford* shall, by means of an assignment to the plaintiff, and consequently in the plaintiff's name, present a clerk to a church, full in name and form, but known to the parties to be vacant in reality, that is an illegal contract, and a presentation made under it is void. Such a decision, it has been argued, will open the door to many nice questions, and to much litigation; the only just criterion of a simoniacal contract has been said to be the actual vacancy of the church; and it has been asked where the line is to be drawn, and whether a conveyance made a few days, or weeks, or months before vacancy, the incumbent being sick, and not expected to survive long, can be good, if a conveyance made a few hours before the decease of a sick incumbent, is void? To all this, the statute is an answer. It does not notice the vacancy of the church, nor does it make vacancy necessary to render a contract corrupt; it is consistent with the very words of the statute, that a contract may be corrupt even while the church is full. I presume, no person would argue that a sale for money of a next presentation, coupled with an agreement for an instant or early resignation, would not be within the statute, and void; and if vacancy is not necessary to a corrupt contract, the particular facts and circumstances of every case must be attended to, as the best criterion of the nature and character of a contract. It is needless to repeat the facts of this case; they are, I trust, such as have not often occurred, and are not

(*a*) Moor. 914.

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likely soon to occur again. Our judgment here will govern only in cases of similar circumstances, and not in any case of a fair anticipation of a speedy vacancy, derived from the apparent ill health, infirmity, or age of the incumbent, and the realization of which may be long protracted, or wholly frustrated. We regard the present as the case of a church full in name and form, but vacant in substance and reality, and known to be so by the contracting parties, who, conscious that the contract would not bear exhibition in its real shape, endeavoured to cloak and conceal it under the semblance of a conveyance, more extensive in its form, but narrowed in its effect, by a mutual agreement, to the primary object of their contract, which was the next presentation to a church, which they, throughout the transaction, treated as actually vacant. For these reasons, we are of opinion that the judgment of the Court below ought to be affirmed.

Judgment affirmed.

Monday, February 9.

The KING *v.* R. S. COOKE.

An informal plea in abatement cannot be quashed on motion, though pleaded for delay; it must be demurred to.

THIS was an indictment against the defendant, and three other persons, for a conspiracy, to which this defendant pleaded the following plea in abatement:—" And *Richard Stafford Cooke*, Lord *Stafford*, Baron *Stafford*, who is indicted by the name of *Richard Stafford Cooke*, late of the parish of *Castlechurch*, in the county of *Stafford*, gentleman, in his own person comes, and having heard the said indictment read, prays judgment of the said indictment, because he says that on the day of taking the inquisition aforesaid, and long before, he was, and from thence hitherto hath been, and still is, Lord *Stafford*, Baron *Stafford*, and the state, degree, title, and honour of Lord *Stafford*, Baron *Stafford*, on the day of taking the inquisition aforesaid, and

long before, had and enjoyed, and still has and enjoys, and this he the said *Richard Stafford Cooke*, &c. is ready to verify, &c. Wherefore, &c." On a former day, *Talfourd* obtained a rule nisi for quashing this plea, on the ground that it was informally pleaded, and pleaded for the mere purpose of delay.

Campbell now shewed cause. It is not pretended that if this plea is well pleaded in point of form, it is not a good plea to this indictment. Then if it be informally pleaded, the proper course for the prosecutors to adopt is to demur; because it is quite unusual to call upon the Court to quash a plea in abatement, for informality. The effect of this application is to deprive the defendant of his writ of error, for if this plea should be quashed, he would have no remedy. No case can be cited on the other side in which the Court has ventured to quash a plea in abatement. In *Thomas* v. *Smithies* (*a*), the Court of Common Pleas refused to quash even a nonsensical plea in abatement, but left the party to sign judgment at his peril. The objection, it seems, to the plea is, that the patent by which the defendant's peerage is created, has not been set out, and that the defendant has not deduced his pedigree from the person under whom he derives his title; but this seems unnecessary, *Rex* v. *Knowles* (*b*), *Co. Lit.* 16. b. and n. 3. *Countess of Rutland's* case (*c*), 2 *Hale's P. C.* 240. But the preliminary objection is, that the Court cannot quash this plea, let it be never so informally pleaded. [*Abbott*, C. J. We are certainly not called upon to decide the sufficiency of the plea; the question is, whether we shall quash it, as being utterly bad. It certainly is a strong measure to quash the plea altogether; we will hear the other side.]

Scarlett and *Talfourd* contrà. The object of this plea is, in the first place, to obtain a different mode of trying the defendant's supposed title to the peerage, than that pre-

(*a*) 4 Taunt. 668. (*b*) 1 Ld. Raym. 10. (*c*) 6 Rep. 53.

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scribed by law; and, in the second, to delay public justice. The question is, whether this is a bonâ fide plea; for if it be not, the Court, in its discretion, will quash it. In all criminal proceedings, if a plea be bad, or improperly pleaded, the Court, in its discretion, will either quash it on motion, or leave the prosecutor to demur. This discretion is not exercised with reference so much to the degree of informality apparent on the face of the plea, as to the degree of injury and delay by which the purposes of public justice may be affected. With respect to indictments, it is laid down in *Com. Dig. tit. Indictment* (H), that a defective indictment may be quashed upon motion; and there seems no good reason why the same power should not be exercised by the Court with respect to defective pleas. Here is a plea obviously pleaded for delay, and which ought not to be encouraged. In *Rex* v. *Grainger* (*a*), the Court quashed a dilatory plea, because there was no affidavit to verify it; this at least is an authority to shew, that the Court does exercise a discretion where the plea is pleaded for delay.

Abbott, C. J.—No instance has been mentioned in which the Court has, upon motion, quashed a plea of this description; and I believe none can be found. The case of *Rex* v. *Grainger* is no authority for this purpose, because the plea there not being verified by affidavit, according to the statute (*b*), it could not be received at all as a plea. Indictments may be quashed on motion, but the same reason does not apply to pleas, which stand upon a very different footing. Whatever may be our opinion as to the merits or demerits of this plea, we think it too strong a measure to quash it on motion.

The other Judges concurred.

Rule discharged.

(*a*) 3 Burr. 1617.

(*b*) 4 and 5 Anne, c. 16. s. 11.

The KING *v.* the Mayor, Jurats, &c. of GRAVESEND.

Monday, February 9.

By charter, the corporation of *Gravesend* were to have a capital seneschal, or high steward, and a sub-seneschal, or under-steward, by the latter of whom the judicial and ministerial functions of a recorder were to be performed, but no authority was given him to appoint a deputy, and although a by-law of the corporation required that the under-steward, *or his sufficient deputy*, should be attendant at every court, to discharge the duties of his office: Held, that the under-steward could not appoint a deputy *generally*, to discharge all his ministerial duties.

Semble, that he might appoint a deputy to do some particular ministerial act, with the assent of the corporation.

THIS was a rule calling on the Mayor, jurats, and inhabitants of the villages and parishes of *Gravesend* and *Milton*, in the county of *Kent*, to shew cause why a mandamus should not issue to them, commanding them to admit *Francis Southgate* and *George Nicholas Rich*, as deputies and nominees of the Honourable C. *Vesey*, sub-seneschal or under-steward of the said villages and parishes, to enrol and enter all indentures of apprenticeship of apprentices taken by the inhabitants of the said corporation, to enrol all freedoms of such apprentices, and to enter in a ledger or book the acts and matters agreed upon at any courts or assemblies of the said corporation, and to discharge all other ministerial duties belonging or annexed to the said office. The affidavits in support of the rule stated, that, by a charter of 7 *Car.* 1. the foreman, jurats, and inhabitants of the villages and parishes of *Gravesend* and *Milton*, and their successors, were created a corporation by the name of "The Mayor, Jurats, and inhabitants of the villages and parishes of *Gravesend* and *Milton*, in *Kent*." By that charter, they were to have one capital seneschal, or high steward, and one other person, skilful in the laws of the kingdom, sub-seneschal, or under-steward, who should inhabit and reside in the villages and parishes aforesaid, unless the mayor, jurats, and inhabitants for the time being should dispense therewith. Power was given to the corporation to make by-laws for declaring after what manner the mayor, jurats, and inhabitants, and their officers and ministers should behave and demean themselves in their offices and functions respectively. On the 20th *March*, 1822, two by-laws were made at a corporate meeting; one, requiring that all inhabitants taking apprentices should bring their part of the indenture to the mayor to be signed and allowed, and that the sub-seneschal should then enrol the same in a book, kept for that purpose, and also should enrol the freedom of every person having served

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an apprenticeship of seven years, and then claiming his freedom; and the second requiring that all acts and matters agreed upon at any courts or assemblies holden by the mayor, jurats, and common council of the corporation, touching or concerning the good or government of the same, should, by way of act or order, be forthwith drawn up and entered in some ledger or book to be kept for that purpose by the under-steward of the corporation for the time being; and that the said under-steward or recorder for the said corporation for the time being, *or his sufficient deputy*, should be attendant at every court of record holden before the mayor, and jurats of the corporation, and there should well and faithfully, according to his utmost skill, do, perform, and execute, all and every such thing and things belonging to his said office. On the 21st *March*, the Honourable C. *Vesey*, barrister at law, was elected sub-seneschal of the corporation, and sworn on the 8th *April*, and his residence being dispensed with by the consent of the corporation, he appointed Mr. *Southgate* and Mr. *Rich*, who were both attornies of this Court, to be his deputies, to perform, on his behalf, the ministerial duties belonging to his office, and especially those mentioned in the by-laws above referred to. On the 19th *December*, 1823, Messrs. *Southgate* and *Rich* presented themselves at a corporate meeting, and required to be admitted to the performance of these duties, but were not permitted so to do, and were in fact excluded from the meeting. In addition to the ministerial offices mentioned in the by-laws, the sub-seneschal had several judicial duties to discharge, which were imposed upon him by the charter. He was to act as a justice of the peace, and hold a court of record in the borough. By the charter, he had no power given him to appoint a deputy, and no instance could be found, during the last two hundred years, upon searching the muniments and records of the corporation, in which any appointment had been made of a deputy sub-seneschal, or recorder.

Copley, A. G., *Scarlett* and *Comyn*, on shewing cause against the rule, were stopped by the Court.

Gaselee and *Chitty* contrà. The question is, whether the sub-seneschal of this corporation has authority to depute a competent person to discharge his *ministerial* functions. Undoubtedly he could have no authority to appoint a deputy to discharge his judicial functions, inasmuch as the charter makes no mention of any such power, but with respect to his ministerial duties the case is different. The by-laws set out in the affidavits fully sanction the appointment of a deputy for the discharge of the duties therein mentioned, which are merely ministerial. By the second, "the under-steward, *or his sufficient deputy*, shall be attendant at every court of record holden before the mayor and jurats, and there shall well and faithfully, according to his utmost skill, do, perform, and execute all and every such thing and things belonging to his said office." The by-laws, therefore, expressly sanction the appointment of a sufficient deputy to do ministerial acts, and as the sufficiency of the persons appointed in this instance is not questioned, this mandamus ought to go.

Abbott, C. J.—We are of opinion that this is not a case in which the Court ought to interfere by mandamus. The rule is prayed for in general terms; it does not merely require that these deputies should be allowed to do some particular ministerial act, but that they should be admitted generally to do all ministerial acts. Now if the corporation were compelled to admit these persons so to act, the effect would be to make them corporate officers, which would be contrary not only to the general law of the land, but to the express provisions of the charter of the corporation. Such an appointment as this cannot be sanctioned but by the charter of the corporation. We are not called upon to decide whether, if the deputy had been appointed to do some specific act, and the corporation had sanctioned

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the appointment, it would have been a valid proceeding; but this is an application of a very different nature. It is for the corporation at their meetings to determine what strangers they will permit to interfere in their proceedings; and as the sub-seneschal has clearly no power by the charter to appoint a deputy, we cannot say that the corporation have done wrong, in refusing to permit these persons to act in the manner required.

Bayley, Holroyd, and Best, Js. concurred.

Rule discharged.

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THE KING v. MEAD.

It is a general rule in criminal cases that dying declarations are admissible only where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declaration; therefore, where a defendant had been convicted of perjury, and had obtained a rule nisi for a new trial, pending which he shot the prosecutor, and on shewing cause against the rule for a new trial, an affidavit of the dying declaration of the prosecutor relating to the transaction out of which the prosecution for perjury arose: Held, that it was inadmissible.

INDICTMENT for perjury assigned upon evidence given by the defendant upon the trial of an information in the Court of Exchequer, against a person named *James Law*, whom the defendant had sworn to have been present at, and engaged in, a smuggling transaction, at a place called the *Salt Pans*, in the parish of *Scalby*, in the county of *York*, on the 20th *August*, 1820, upon which occasion, *Law* was acquitted.

At the trial before *Abbott*, C. J. at the *Middlesex* Sittings after *Michaelmas* Term, 1822, the defendant was found guilty. In *Hilary* Term last, the Court granted a rule nisi for a new trial, on the motion of the Attorney General, on the ground that the verdict was against the weight of evidence; and also upon affidavits. After the rule was granted, *James Law*, the prosecutor, was killed by a gun-shot wound near his dwelling in *Yorkshire*, and the defendant,

William Mead, being apprehended and tried at the last *Summer* assizes for *Yorkshire* for that offence, was found guilty of manslaughter.

D. F. Jones, (with whom was *Chitty*,) on shewing cause now against the rule for a new trial, proposed to read an affidavit of the dying declaration of *James Law*, in which he denied all participation in the smuggling transaction to which *Mead* had deposed in the *Exchequer*; whereupon

Copley, A.G. (with whom were *Clarke*, *Gurney*, and *Walton*,) for the defendant, interposed, and objected to the reception of *Law*'s dying declaration, on the ground that such declarations are admissible only in cases where the death of the deceased is the subject of inquiry in a court of justice, and where the declaration relates to the immediate circumstances of the death. The declaration now tendered had reference not to the circumstances under which the deceased came by his death, but to a transaction long antecedent, and consequently could not be admissible as evidence upon an inquiry concerning this perjury, which was a matter wholly collateral to the death of the deceased. Upon this principle, it was held in *Doe* v. *Ridgway* (*a*), that in the proof of a pedigree, the dying declarations of A. as to the relationship of the lessor of the plaintiff to the person last seised, are not receivable in evidence.

Jones and *Chitty* contrà. The dying declaration of the deceased now proposed to be read is so intimately connected with the subject of the present inquiry, that it cannot be rejected upon the principles contended for on the other side. In Mr. *Phillips*'s Treatise on the Law of Evidence, page 200, it is laid down, that the principle upon which evidence of this nature is excepted out of the general rule as to hearsay evidence, is founded partly on the awful situation of the dying person, which is considered to be as pow-

(*a*) 4 B. and A. 53.

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erful over his conscience as the obligation of an oath, and partly on a supposed absence of interest on the verge of the next world, which dispenses with the necessity of cross-examination. (a) This principle equally applies to civil as to criminal cases, and cannot be limited to those only where the death of the deceased is the immediate subject of charge against the defendant. This has been laid down in the case of a subscribing witness to a bond, whose dying declarations were allowed to be given in evidence by *Heath*, J. (b) to prove it a forgery; and in *Wright* v. *Littler*, (c) evidence of a dying confession by the subscribing witness to a deed was admitted. So that these are authorities to shew that the rule contended for on the other side cannot be confined to the narrow limit of an inquiry into the cause or circumstances of the death. But in this case the dying declaration is pertinent and relevant to the matter which is the subject of the indictment for perjury. The circumstances of the death are so connected with the motive for the hostility which the defendant is supposed to have entertained towards the deceased, and depend so much upon each other as not to be separated. The deceased, after giving an account of the manner of his death, proceeds, as a part of the same statement, to negative his having been present at the transaction to which *Mead* deposed in the *Exchequer*, and which was the cause of that angry feeling which led to the fatal catastrophe. The dying declaration, therefore, of the deceased respecting the smuggling transaction is part of the res gestæ, and may now be received. But, admitting that this declaration could not be admitted upon the trial itself, still it may be received in the discretion of the Court as to the reasonableness of granting a new trial, on the same

(a) *Ld. Mohun's* case, 12 How. St. Tr. 949. *Rex* v. *Reason* and *Tranter*, 1 Stra. 499. S. C. 16 How. St. Tr. 1. *Tinckler's* case, 1 East, P. C. 354. and 2 Hume's Com. on the Law of Scotland, respecting Crimes, 391. *Woodcock's* case, 2 *Leach*, Cr. C. 566. and *Bambridge's* case, 17 How. St. Tr. 383.

(b) Cited by Lord *Ellenborough* in *Aveson* v. *Kinnaird*, 6 East, 195.

(c) 3 Burr. 1244.

principle that the affidavits of parties to the record, both in civil and criminal cases, on motions for new trials, are admitted.

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Abbott, C. J.—I am of opinion that the affidavit of the dying declaration of this person is not admissible upon this inquiry. I believe it is a general rule that evidence of this description is only admissible where the death of the deceased is the subject of inquiry, and the circumstances of the death are the subject of the dying declaration. There may be exceptions to this general rule; but this is not one. That part of the dying declaration which is relied upon in this case does not appear to have been made for the purpose of accusing any body, but rather of clearing the deceased himself from the imputation of having been concerned in the smuggling transaction there adverted to; and therefore, on that ground, it is inadmissible. The cases relied upon in the argument for the prosecution are, in their nature, perfectly dissimilar to this, and afford no reason for taking this case out of the general rule, to which I have adverted. In the case before Mr. Justice *Heath*, cited in *Avison* v. *Kinnaird*, the declaration amounted to a confession, by the deceased himself, that he had been guilty of a heinous offence, in having been concerned in forging the bond in question. So also in the case of *Wright* v. *Littler* the same observation arises. For these reasons, therefore, I am of opinion that this affidavit ought not to be received.

Bayley, Holroyd, and Best, Js. concurred.

The affidavit was therefore rejected.

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The King *v.* Rawson and others.

Where to an indictment at the Assizes for a misdemeanor, defendants consented to plead guilty, upon an understanding that they were not to be brought up for judgment; and no stipulation having been then made by the prosecutor for the payment of his costs: Held that he was not afterwards entitled to a rule on the Crown side to have his costs taxed.

THESE defendants had been indicted at the last Assizes for the county of *Lancaster* for a riot and assault. It was arranged with the prosecutor, that if they submitted to a verdict of guilty, they should not be brought up for judgment; and upon that understanding they pleaded guilty accordingly. Since then the prosecutor had obtained a side-bar rule for taxing his costs, although nothing had been said at the Assizes upon the subject of costs.

Scarlett on a former day obtained a rule nisi for discharging that rule on the ground that inasmuch as nothing was said at the Assizes upon the subject of costs when the defendants submitted to a verdict, the prosecutor ought not to be suffered now to impose that term upon the defendants. Had the prosecutor stipulated for costs, that might be a different matter.

Cross, Serjt. now shewed cause against the rule, and insisted that the prosecutor was always considered as being intitled to his costs as a matter of course in cases of this nature. It was implied by one of the conditions of the agreement, that the prosecutor was to have his costs, if he consented not to bring the defendants up for judgment.

Per Curiam.—It is by no means a matter of course that a prosecutor is intitled to his costs where a defendant submits to a verdict of guilty upon an understanding that he is not to be brought up for judgment. If a prosecutor means to impose that term upon the defendant, it should be made matter of stipulation at the time, or there should be at least some understanding between the parties upon the subject. If a prosecutor, by agreeing not to bring the defendant up for judgment, expects to derive a benefit not usually given to prosecutors, he should take care to have

the matter distinctly understood when he enters into the arrangement with the defendant. It does not appear here that the subject of costs was mentioned at all at the Assizes, and we think, therefore, that the prosecutor cannot now call upon the defendants to pay his costs.

Rule absolute.

Lambert *v.* Buckmaster.

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An attorney has a lien upon deeds, papers, and writings belonging to a bankrupt, not merely for his bill for business done before the bankruptcy, but for the costs of an action brought against him after the commission issued, to recover the amount of his bill, unless it appears that, as an attorney, he had improperly commenced the action for the purpose of increasing costs.

ON shewing cause against a rule for referring it to the Master to review his taxation of costs, the case was this:— *John Buckmaster* and *William Buckmaster*, co-partners in trade, had been in the habit of employing Mr. *Watson*, an attorney, sometimes separately, and sometimes jointly. He had been concerned for *John Buckmaster* separately, and also for the partnership, in bringing and defending different actions, and each partner was indebted to him to a considerable amount. On the 16th *November*, 1822, they became bankrupts, and a joint commission issued against them. At the period of the bankruptcy, Mr. *Watson* had in his possession two leases, which were the separate property of *John Buckmaster*; and after the commission issued, he brought two several actions, one against *J. Buckmaster* alone, for his separate bill of costs, and the other against the partnership, for the costs due on the joint account; and in each action he recovered the amount of his bills, and the costs of those actions were taxed at the sum of 47*l*. Before the actions were brought, notice was given to the assignees that they would be brought, unless the bills were paid, but they declined paying them. The assignees having claimed the leases which were in the possession of Mr. *Watson*, he refused to deliver them up, claiming a lien upon them, not only for the amount of his original bills of costs, but also for the costs of the actions. The assignees insisted that they were not liable to pay more than the costs

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incurred up to the time of the bankruptcy, and that they were not liable for the costs afterwards incurred. In order to save expense, it was agreed by the parties, at the suggestion of *Bayley*, J. that it should be referred to the Master to ascertain the precise sum due against each of the bankrupts, and what was the amount of the costs of the two actions. The Master was of opinion that the attorney was entitled to the amount of his two bills, and also to the costs of the two actions. The object of the present motion, which was made at the instance of the assignees, was for the Master to review his taxation; and that upon payment of the sum actually due at the time of the bankruptcy, deducting the costs of the actions, the attorney should deliver up the leases in his possession.

Hutchinson shewed cause. The actions upon the two bills were brought with the knowledge and privity of the assignees, because they were distinctly informed that unless the bills were paid, actions would be commenced against the bankrupts. This application is made at the instance of the assignees, but they can have no better claim upon these deeds than the bankrupts themselves; and if there had been no bankruptcy, it is quite clear that the *Buckmasters* could not have taken the leases out of the possession of the attorney without paying the debt and costs. If indeed the assignees had offered to pay the bills when they received notice from the attorney that actions would be commenced, and the attorney had, notwithstanding such offer, gone on with the actions, then the Court, in the exercise of its equitable jurisdiction, would have disallowed the costs of the actions; but the attorney being driven to bring the actions after notice to the assignees, it would be unreasonable now to deprive him of his lien both for the debt and costs, the latter being in fact incidental to the former.

Comyn contrà. The question is how far the law of lien

extends to affect the property of third persons after a commission of bankrupt has issued. Now here it cannot be said that the attorney has any lien for costs incurred after the issuing of the commission. It may be fully admitted that the assignees stand in the same situation as the bankrupt himself, and that all the liability which affected this property up to the issuing of the commission, would bind the assignees; but it never can be said in point of law that the assignees are to be affected by an increase of debt incurred after the bankruptcy. Here is an increase of debt incurred either by the bankrupt himself, or by the voluntary act of the debtor. This is not a case between attorney and client, but involves an important general question, whether any person who has a lien upon any species of property, can extend the liability of the property to a debt incurred after a commission of bankrupt has issued. It has been held that a bankrupt cannot extend the liability of his assignees after bankruptcy. Therefore, wherever the rights of third persons intervene, the question of lien is at an end. Here the question of lien ended at the time the commission of bankrupt issued. At that time all the property of the bankrupt vested in the assignees and the bankrupt had no power to charge his property beyond the amount to which it was then liable. [*Bayley*, J. Suppose a mortgagor becomes bankrupt, and after the commission issues, the mortgagee brings ejectment, or files a bill in equity for a foreclosure, can the assignees redeem the estate without paying the costs of the ejectment or the bill in equity?] That is a very different case from this. A mortgagee has the absolute legal estate in him, and therefore the assignees cannot redeem except on those terms which, in a court of equity, they would be obliged to submit to; but a right of lien does not vest the property in the person with whom it is pledged; he has nothing more than an equitable title. This is a dry question of law, whether an attorney can extend his lien by his own voluntary act, by commencing an

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action and proceeding to judgment against a person who is a bankrupt at the time the action is brought.

Abbott, C. J.—We are of opinion that the assignees of the bankrupt stand in the same situation as the bankrupt himself. Therefore, to whatever extent the party holding these deeds has a right of lien as against the bankrupt, to that extent he has the same right to hold them as against the assignees. It is clear that if there had been no bankruptcy, the lien would have accrued to the extent of the costs of the actions brought for the recovery of the original bills; and although there is a bankruptcy, still the attorney is entitled, as against the assignees, to his lien to the extent of the costs as well as the debt, unless you could shew that he, being an attorney of the court, had improperly commenced these actions for the purpose of increasing the costs for his own benefit.

Bayley, J.—The assignees might very easily have prevented these actions if they had paid the bills upon receiving notice that actions would be commenced. The answer to Mr. *Comyn*'s argument is, that at the time of the bankruptcy there was nothing vested in the bankrupt, but a right to redeem these deeds. Then it follows that nothing but a right to redeem them passed to the assignees. They might have redeemed them immediately upon the bankruptcy, if they thought fit. They should have redeemed them at the time they received notice that the attorney would not deliver them up until his lien was satisfied; but if they did not think fit to do so, they can now redeem them only on such terms as the bankrupt himself must have submitted to.

Holroyd, J.—The attorney's right of lien is not increased in consequence of an act done since the bankruptcy, but by reason of a debt which had accrued before; and notwithstanding the bankruptcy, the same right of lien still con-

tinued; and if the amount of it has been increased by his being imprudently suffered to proceed by action, as he lawfully might, to enforce payment of his demand, the costs thereby incurred become an incident to the debt, for which he has still a right of lien.

Best, J.—The fallacy of Mr. *Comyn*'s argument is, that the right of lien which the attorney had before, became devested out of him after the bankruptcy. Now it is impossible that any thing can be taken out of the attorney after the bankruptcy which he had before, for whatever he had then, remained in him; and therefore, if he had a lien as against the bankrupt, he ought to stand in as good a situation as against the assignees, who, by their own imprudence, have suffered the attorney to incur these increased costs. I am of opinion that the same right of lien remains in the attorney after the bankruptcy as against the assignees, as he had against the bankrupts before the commission issued.

Abbott, C. J.—If the assignees had tendered the amount of the original bills before the actions were brought, then it would have been an answer to this claim of costs, and we should have yielded to this application.

The rule for referring it to the Master to review his taxation was discharged with costs, and the original rule and the Master's report thereon was made absolute.

Lewis v. Harris.

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Where an inquisition of damages was excessive, and the Court granted a rule for setting it aside, leaving it to an arbitrator to say for what sum the verdict should stand (nothing being said at the time as to costs), and the arbitrator reduced the damages considerably. Held, that the plaintiff was not entitled to the costs of setting aside the inquisition.

CAMPBELL on a former day obtained a rule calling on the defendant to shew cause why the Master should not

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review his taxation of costs in this cause, under the following circumstances:—Judgment having been suffered by default, a writ of inquiry of damages was executed before the secondary; and the jury having given the plaintiff more than he was entitled to recover, the defendant moved to set aside the inquisition for the excess. On that occasion the Court recommended that the amount of damages should be referred to a gentleman at the bar, but nothing was then said about the costs of moving to set aside the writ of inquiry. In the result the arbitrator reduced the damages considerably, and in taxing the costs the Master refused to allow the plaintiff the costs of the rule for setting aside the inquisition of damages; and the question now was, whether the plaintiff was entitled to those costs.

Maule contended that, as the plaintiff had originally recovered more damages than he was entitled to, it was unreasonable that the defendant should bear the burthen of setting the verdict right. When the amount was referred to the arbitrator, nothing was said about costs, and therefore it would be extremely hard to impose the costs of setting aside the inquisition upon the defendant, the arbitrator having reduced the damages considerably. Even in cases where a plaintiff obtains a verdict, and a new trial is granted without any stipulation as to costs, and the plaintiff recovers a second verdict, he is only entitled to the costs of one trial. Upon this principle the plaintiff is not entitled to the costs of setting aside a verdict which he has improperly obtained. The justice of the case is that each party should bear his own costs of setting aside the inquisition.

Campbell, in support of the rule. When a defendant seeks to set aside an inquisition of damages for excess, it is always upon payment of costs that the rule is granted. The defendant comes to the Court for a favour, and if he puts the plaintiff to the necessity of opposing the rule for reducing the damages, he ought to bear the costs. Here

the defendant has the indulgence of having the damages reduced, and therefore it ought to be at his expense, not the plaintiff's. The costs of setting aside the inquisition are costs in the cause; and as the plaintiff has the verdict, the costs follow as a matter of course.

Bayley, J.—Provision should have been made respecting the costs at the time the rule for setting aside the inquisition was granted. If the plaintiff had stipulated that it should be upon payment of costs, then the defendant would have had an opportunity of considering whether it would be worth his while to take the rule upon those terms. It has been truly said by Mr. *Maule*, that where a plaintiff obtains a verdict, and a new trial is granted without any stipulation as to costs, and the plaintiff recovers a second verdict, he is entitled to the costs of one trial only. Here no stipulation was made as to costs, and therefore I think the burthen of paying the costs of setting aside the inquisition ought not to fall wholly upon the defendant, who had no other alternative but either to submit to an improper verdict against him, or come to the Court to set it right.

Holroyd, J.—The plaintiff wants the costs of a proceeding, the event of which is against him. I think he ought not to have them.

Abbott, C. J. and Best, J. concurred.

Rule discharged.

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The King *v.* The Mayor, Aldermen, and Recorder of the Borough of Fowey.

Mandamus will not lie to compel a corporation to elect members of an indefinite body; therefore, where a charter authorized the mayor and recorder, or their respective deputies, and the rest of the aldermen of a borough for the time being, or the greater part of them, from time to time, and at all times thereafter, as often and when to them should seem fit and necessary, to nominate, chuse, and prefer so many and such persons to be free burgesses of the borough, as they pleased, and to those free burgesses, so to be chosen, to administer an oath for their fidelity to the borough, the Court refused to grant a mandamus to compel the mayor and aldermen to proceed to the election of free burgesses, or to hold a meeting for the purpose of considering the propriety of proceeding to such an election, in order to fill up vacancies in the aldermanic body, and the then existing body of free burgesses respectively.

THIS was a rule calling upon the mayor, aldermen, and recorder of the borough of *Fowey*, in *Cornwall*, to shew cause why a writ of mandamus should not issue, directed to them, commanding them to proceed to the election of a competent number of free burgesses of the borough, or, to hold a meeting for the purpose of considering the propriety of proceeding to such an election. The affidavits disclosed the following facts.—By a charter of the 59 G. 3. which set out a former charter, and recited that the corporation of *Fowey* was in danger of dissolution in consequence of having neglected and omitted to maintain a distinct and separate body of the burgesses, the borough was made a body corporate and politic, by the name of "*The mayor and free burgesses of the borough of Fowey*," and declared to be perpetual by that name. The charter then provided, that nine of the most honest and discreet free burgesses of the borough should be chosen in manner thereinafter mentioned, and should be called aldermen and council of the borough; that one of the most honest and discreet aldermen should be chosen as thereinafter mentioned, and be called mayor of the borough; that the mayor and aldermen for the time being should be called the common council of the borough; and that there should be one honest and discreet man, learned in the laws of *England*, who should be called recorder of the borough. It then directed, "that it should be lawful for the mayor and recorder, or their respective deputies, and the rest of the aldermen of the said borough for the time being, or the greater part of them, (of whom the mayor and recorder, or their respective deputies, should be two,) from time to time, and at all times thereafter, as often

and when to them should seem fit and necessary, to nominate, chuse, and prefer so many and such persons to be free burgesses of the said borough as they pleased, and to those free burgesses so to be chosen to administer the oath for their fidelity to the said borough, and all things faithfully to do which belong to the place of free burgesses to be done." It then appointed *G. G. White* to be the first and modern mayor of the borough, and *J. Kimber*, *T. Graham*, *T. Orchard*, *W. Rashleigh*, *J. Bennett*, *J Hallatt*, *J. Messer*, *G. G. White*, and *R. Hearle*, to be the first and modern aldermen of the borough, to continue in that office during their lives, unless, in the mean time, for ill behaviour, or any other offence, they should be removed. It then appointed *G. Lacy* to be recorder of the borough during his life, and as long as he should behave well. It then appointed *R. P. Flamank*, *C. Bennett*, *N. Eveleigh*, *G. Thomas*, and *T. Nickells*, to be the first and modern free burgesses of the borough, to continue in that office during their lives, unless, &c. as before; and declared, that in case any one or more of the aldermen of the borough for the time being should die, or be removed from that office, it should be lawful for the mayor, recorder, and justices of the peace, and the rest of the aldermen of the borough for the time being, or the greater part of them, to elect and prefer one other or more of the free burgesses, inhabitants of the borough, for an alderman or aldermen, in the place or places of him or them so happening to die or be removed, to supply the number of nine aldermen of the borough; and that he or they so elected and preferred to the office or offices of alderman or aldermen of the borough, the office or offices should have and exercise, during his or their natural life or lives, unless, &c. as before; he, or they, so chosen, first taking his or their corporal oath, or oaths, before the mayor, recorder, or one of the justices of the peace of the borough for the time being, or before two or more of the aldermen of the borough, or, for want of mayor, recorder, justices, and aldermen, (and not otherwise), before three or more free

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burgesses, inhabitants of the borough for the time being, well and faithfully to execute that office in all things thereunto belonging. It then empowered the recorder to appoint a deputy, and constituted the mayor, the ex-mayor, the recorder, and the deputies of the mayor, and the recorder for the time being, and the senior alderman, and the senior free burgess of the borough, justices of the peace for the borough. It was then alleged, that the persons appointed by the charter to be mayor, aldermen, recorder, and free burgesses, had respectively taken the proper oaths; that the charter had in every other respect been duly accepted and put in execution; that the body corporate had been during the last three years, and still was, reduced to the number of six aldermen, and four free burgesses; that out of those six aldermen, one, namely *J. Kimber*, was in a dangerous and precarious state of health, being more than seventy years old, and having had a paralytic stroke; and that, in consequence of his age and infirmities, he was unable to discharge his duties as an alderman and a justice of the peace; that out of the four free burgesses, one, namely *T. Nickells,* was more than seventy years old, and was in an infirm and dangerous state of health; that another, namely *R. P. Flamank,* was seventy years old; that another, namely *N. T. Eveleigh,* was not an inhabitant of the borough, and was consequently, by the terms of the charter, ineligible to the office of alderman; and that, by means thereof, the body corporate had for some time past been, and still was, in great danger of being dissolved.

Adam and *G. Bernard* shewed cause. An application for a mandamus, calling upon a corporation to elect members of an indefinite body is new, and cannot be supported. The principle on which alone the Court exercises this high prerogative power is, that a real necessity for such a remedy exists, and that, without it, the ends of justice must be defeated. The present does not appear upon the affidavits to be a case of that description, and no precedent

can be found where the writ has been granted under such circumstances as are here disclosed. It is said in *Buller's* Nisi Prius, (*a*) "that where by charter or prescription the corporate body ought to consist of a *definite* number, and they neglect to fill up the vacancies as they occur, the Court will grant a mandamus," clearly intimating that learned author's opinion to have been, that the Court would not grant a mandamus to compel a corporation to fill up the vacancies in an *indefinite* body. The power given to this corporation is purely discretionary, and it is quite clear that a mandamus does not lie to compel a party to do that which he has a discretion to do or to omit. *Com. Dig. Mandamus.* [B.] 1. It is said by *Eyre*, J. in the *Queen* v. *Heathcote*, (*b*) that "all mandamuses" are "either to restore persons turned out, or to admit those refused," and if that is a correct definition, it certainly does not comprehend the present case. In *Rex* v. *Pateman*, (*c*) it was laid down at the bar as settled law, and not denied by the Bench, that "there cannot be any mandamus to compel the corporation of *Bedford* to fill up the office of alderman, because the number of aldermen is indefinite;" and, therefore, the result of all these authorities is, that it has been the general and settled opinion of the profession, that a mandamus does not lie to compel a corporation to elect members of an indefinite body. Then is there any necessity for the interposition of the Court in this case? Certainly not. The corporate body is not in danger of being dissolved. True it has been decided by *Rex* v. *Passmore*, (*d*) that "when an integral part of a corporation is gone, and the corporation has no power of restoring it, or of doing any corporate act, the corporation is so far dissolved, that the Crown may grant a new charter." But here, even if all the free burgesses were made aldermen, that integral part of the corporation would not be gone, nor would the corporation be in danger of dissolution, be-

(*a*) P. 201.
(*b*) 10 Mod. 54.
(*c*) 2 T. R. 777.
(*d*) 3 T. R. 199.

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cause the aldermen would still have power to elect such other persons to be free burgesses as they might think proper. The charter points out only two purposes for which the free burgesses are necessary; first, as constituting that body out of which the aldermen from time to time may be chosen; and second, as assistants at the election of the mayor from time to time. Undoubtedly, the aldermen may proceed to elect new free burgesses, so soon as all the existing free burgesses have been elected aldermen; but it by no means therefore follows, that the aldermen are bound to elect new free burgesses, before the present vacancies in their own body have been filled up. Indeed, such a mode of proceeding would be manifestly subversive of the spirit and meaning of the charter. The aldermen are a definite body, limited in number to nine. The free burgesses are to be elected by the mayor, aldermen, and recorder. The meaning of the charter, therefore, clearly was, that the election of free burgesses should be by a majority of the nine aldermen. But, should this mandamus go, the free burgesses would be elected not by a majority of nine, but by a majority of five aldermen. All that can be done, consistently with the spirit of the charter, in the present situation of the corporation, is, first, to fill up the vacancies among the aldermen, who are a definite and elective body; and then, to elect such persons to be free burgesses, as the aldermen, in the due execution of their powers, and the exercise of their judgment, may think proper. Upon these grounds, the Court will be of opinion, that this mandamus ought not to be granted.

Gaselee and *Wilde*, in support of the rule. It is perfectly consistent with the letter and spirit of the charter to contend that there is now an incumbent duty upon the aldermen to proceed to the election of free burgesses, or at least, in the alternative, of this rule, to hold a meeting for the purpose of considering the propriety of proceeding to such an election. The charter appointed specifically nine aldermen, of whom six only are now in office. It also ap-

pointed five free burgesses, three of whom only are capable of attending to the duties of their office. If, therefore, all the vacancies in the aldermanic body were filled up, not one free burgess would remain. It must be admitted that no case can be found in which the Court has granted a mandamus to compel a corporation to elect members of an indefinite body; but if the perpetuation of the corporation depends upon the election of such members, and a consequent duty is so created, the purposes of justice will render it proper that a mandamus should go. It must further be admitted that it lies upon the party who applies for the remedy, to shew that a necessity for its application exists, and that has been sufficiently shewn by the facts disclosed by these affidavits; for it is plain that unless the aldermen do elect more free burgesses, the corporate body is in danger of dissolution. The charter makes free burgesses an indispensible constituent part of the corporation, for it appoints the senior free burgess a justice of the peace, and provides that in the want of the mayor, aldermen, and recorder, three or more free burgesses shall have authority to administer the oaths. The charter, therefore, had in contemplation that there should always be three free burgesses, at the least, existing in the borough; and though at present there are that number, still, when the vacancies among the aldermen are filled up, there will not be one free burgess left capable of discharging the duties appurtenant to that office. But again, whilst the number of free burgesses eligible as aldermen, corresponds exactly with the number of vacancies in the body of aldermen, the latter have not that power of selection which the charter intended they should exercise, and the consequence is that the vacant offices of aldermen must be filled by succession, and not by election, which will be contrary to the express provision of the charter. Under these circumstances the Court will feel this to be a proper case for the interposition of its discretionary power, and will make this rule for a mandamus absolute.

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ABBOTT, C. J.—I think this rule ought to be discharged. We have not been furnished with any authority which would justify us in making it absolute; and I take it to be clear that no instance can be found where the Court has granted a mandamus to compel a corporation to elect members of an indefinite body. The general principle upon which the Court acts in cases of this kind is, that where there is a duty shewn, the Court will interfere to enforce its performance; and the question in this case therefore is, whether there is a duty of the body corporate, in its present state, to proceed in the first instance to the election of free burgesses. Now what does the charter declare upon this point? It appoints nine aldermen, and an indefinite number of free burgesses, with power to the corporation from time to time to elect such persons as they shall think fit to become free burgesses. Five were originally named, and there are at this moment three at least remaining, against whom no objection is raised. It then provides, first, that the senior free burgess shall be a justice of the peace; second, that the free burgesses shall assist the aldermen in the election of the mayor; and third, that for want of the mayor, recorder, aldermen, and justices, three free burgesses shall be competent to administer the oaths to the persons elected aldermen. At present there are three free burgesses capable of administering the oaths, if it should become necessary for them to do so; and the short question really is, whether we shall interpose to compel the corporation to elect additional free burgesses before they elect persons to the vacant offices of aldermen? At present also there are sufficient free burgesses remaining to fill up the vacancies among the aldermen; but it is said that when those vacancies are filled up, there will be no active or efficient free burgess left. It is also said that we ought to compel an election of free burgesses, for the purpose of constituting a larger number of persons out of whom the new aldermen may be elected, and thus giving the aldermen a more extended power of selection. But in doing that, how are we to regulate our

conduct? What additional number are we to select? What additional number will be sufficient? Are we to raise the present number to five, as originally done by the charter, or are we to raise it to twenty? Where are we to draw the line? Undoubtedly, the greater the number of free burgesses, the greater will be the power of selection on the part of the aldermen; but it is utterly impossible for us to determine what the precise number ought to be. It is not unworthy of observation that the present free burgesses are part of the five originally appointed by the crown; and as the aldermen are to be supplied out of the free burgesses, those five persons must have been regarded by the Crown as proper persons to succeed to the office of alderman. It is to be lamented that the corporation have permitted so many of the aldermen's offices to become vacant, without ever proceeding to fill up any one of them, because that delay may eventually superinduce the dissolution of the corporation, though we certainly cannot at this moment affirm that it must and will have that effect. If a mandamus had issued to elect aldermen, and had been duly served upon all the parties who are bound to attend and assist at that election, and they had nevertheless neglected to perform their duty, the Court would have had no difficulty in dealing with them for that breach of duty and obedience. But, as respects the present application, I cannot see that any such strong case of necessity as ought to be shewn, to induce the Court to command an election of free burgesses, as a prior step to the election of aldermen, has been shewn, and therefore I am of opinion that this rule must be discharged.

Bayley, J.—I have been in the course of the argument considerably impressed with the idea that it would be proper to grant a mandamus in the second alternative of the rule, that a meeting might be held, at which the corporation might consider whether they ought to elect free burgesses at all; and whether they ought to proceed to the election

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of free burgesses, as a prior step to the election of aldermen. Upon consideration, however, I am satisfied that we ought not to interfere at all. Vigilantibus, non dormientibus, jura subserviunt, is a very useful rule of law, and one which applies properly to all corporate bodies, and especially to the present case. It seems to me that the parties by whom this application is made have been guilty of great negligence, and are therefore not in a situation to claim any favor at the hands of the Court. It was incumbent on the existing corporation to take care that the first vacancy was filled up in a reasonable time after it occurred. If that had been done, as the aldermen must, by the terms of the charter, be supplied out of the existing free burgesses, and as no new free burgesses had been chosen, one of the five original free burgesses must have been elected alderman, and then a majority of the nine aldermen must have determined whether they would or would not elect any additional free burgesses. But, instead of this, the parties have lain by till the number of aldermen was by degrees reduced nominally to six, and in effect to five, and have suffered the present result to occur, that although there ought to be nine aldermen in the corporation, there are in fact only five. The charter directs that the nine aldermen shall decide whether any and what free burgesses shall be elected; but if this mandamus were to go, we should be directing five aldermen to determine that question, which would be productive of injustice, inasmuch as it would tend to annihilate the inchoate rights which originally attached to the present remaining free burgesses. If the first vacancy of alderman had been promptly filled up, one of these must ex necessitate have been elected to it; but if the majority of the present aldermen are opposed to the views of the present free burgesses, they may elect a new set of free burgesses, who may afterwards succeed to the office of aldermen, to the entire exclusion of the free burgesses originally named as such by the charter, and evidently pointed out as proper persons to be elected aldermen. Upon this short view of

the case, I am of opinion that the rule should be discharged.

Holroyd, J.—The charter directs that the mayor and aldermen shall elect such persons to be free burgesses as they shall think fit; they have therefore a discretionary power, and the court have no right to dictate what course they should pursue. Whether a mandamus might issue, commanding the parties whose duty it is to elect the free burgesses to hold a meeting for the purpose of considering the propriety of such an election, is a different question; and though it is not necessary, upon the present occasion, to decide that question, I am free to confess, that if such a mandamus would lie at all, I have entertained great doubt whether this would not be a proper case for it. But upon my present view of the particular circumstances of this corporation, I think no mandamus ought to issue. The charter names five free burgesses, but does not constitute them a definite body, because it had previously declared that the mayor and aldermen might elect as many as they thought proper; and it does not, as in the case of aldermen, direct an election to fill up vacancies among the five free burgesses originally named. The free burgesses appear to me, therefore, to be purely an indefinite body. Then, with respect to the aldermen, it is clearly the duty of the corporation to fill every vacancy among them, within a reasonable time after it occurs, and so to keep up the full number of nine, in order that the mayor and aldermen, of whom he is one, may discharge their functions in their full power, and to the greatest advantage of the inhabitants of the borough at large. The real question now raised is, whether the free burgesses are to be elected by the majority of the whole nine aldermen, or by the majority of the five or the six now remaining? If the court interfered at all, it could only be to compel them to meet and consider whether they will elect or not; and if they decided to elect, it could not be an election by the full number of aldermen which the charter directs it

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to be. I therefore concur in thinking that the present mandamus cannot be granted.

Best, J.—I am by no means free from doubt upon this question, but, as at present advised, I lean to the opinion that we ought to grant this mandamus. It seems to me that there has been in this borough too much of that species of conduct which has been characterised by the name of jobbing, and that the individuals who have been guilty in that respect will unfortunately be protected in their misconduct by our refusal to interfere. I quite agree that it was the duty of the aldermen from time to time to fill up the vacancies that occurred in their body, and that they have been blameable in omitting to do so; but I cannot consider that as affording any reason for refusing this mandamus. This question does not involve the interests of the aldermen only, but the interests of the inhabitants at large; and they ought not to be prejudiced by the default or misconduct of any member of the corporation. It has been argued that by law we have no authority to grant this mandamus. A hundred years ago, such an application as this, in all probability, would have been refused, because at that period the received idea was, that a mandamus could issue only to enforce the performance of a ministerial duty; but recent cases have extended the rule; and now a mandamus certainly lies for the performance of any public duty. It is said in *Buller's* Nisi Prius (*a*), "that where by charter or prescription the corporate body ought to consist of a definite number, and they neglect to fill up the vacancies as they occur, the Court will grant a mandamus;" and for this reason, that the maintenance of the definite body is essential to the perpetuity of the corporation. Applying the same reason to an indefinite body, it follows that the Court ought to grant a mandamus to maintain that indefinite body. It seems to me, that unless an election of free burgesses takes place, the dissolution of this corporation is not only pro-

(*a*) P. 201.

bable, but inevitable; a result which, if possible, we ought to prevent. The King, speaking by his charter, has willed this corporation to be perpetual, and every constituent part of it is thereby enjoined to the performance of every duty essential to its preservation. What are those essentials? Successive elections, from time to time, not in form only, but in substance, of the members of the corporation; and these have been neglected. Such is the present state of this corporation, that if one of the existing aldermen were to die, an election of new free burgesses would be impracticable, and the three free burgesses now remaining, may in the mean time compel their own election as aldermen, though not one of them may be fit for the office. There are, de facto, four free burgesses, but one of them is not an inhabitant; and supposing they were reduced to two, those two could compel their own election as aldermen. I concur in assuming that the five original free burgesses were competent to hold that office, because they were appointed to it by the charter; but it by no means follows that they are equally competent to hold the office of aldermen, which is a magisterial office, requiring many qualifications unnecessary to a free burgess. It has been suggested that the inchoate rights of the free burgesses would be invaded by our granting this mandamus, but I do not admit that a man is entitled to be elected merely because he is eligible; on the contrary, I think he may be eligible and yet have no right to be elected. No case has been cited, nor can, I believe, be found, which has decided that a mandamus does not lie under circumstances like the present; and I very much doubt whether the principles laid down by Lord Chief Baron *Comyns* in his Digest (a), and by Mr. Justice *Eyre* in the *Queen* v. *Heathcote* (b), ought to be considered as law in the present day. I take the proper rule of law to be this: that whenever a corporation is reduced to such a state as affords no choice of persons to fill the offices which the charter has directed to be filled by election, the

(a) Com. Dig. Mandamus, B. 1. (b) 10 Mod. 54

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Court may and ought to interfere to compel them to adopt such measures as may render a free choice practicable. I think this corporation comes within that rule; there cannot, as it is at present constituted, be any free choice here, for though there are three persons eligible, their promotion could not be called an election; it would be a mere succession, the result of which would be, that the entire management of the corporation would fall into their hands. Again, I conceive it to be an established rule of law, that wherever there exists a real political necessity that a certain act should be done, this Court has a right to see that that act is done, and I am clearly of opinion that such a necessity exists in this case. The general principle also, that a mandamus ought to issue wherever the justice of the country calls for its application, seems to me to govern this case. To issue it where the justice of the country does not require it, would be to abuse the power delegated to the Court; but where we find that the ends of justice can be gained only by the exercise of this high prerogative power, we ought not, in my opinion, to suffer ourselves to be shackled in the exercise of our authority by the narrow rules and limited principles of ancient times and manners. I am strongly impressed with the belief that the withholding this mandamus will be productive of mischief, and of a denial of justice; and therefore I am of opinion that this rule ought to have been made absolute.

Rule discharged.

Tuesday, February 10.

Park v. Strockley.

A plaintiff convicted of a conspiracy, is not incompetent to make an affidavit to hold a defendant to bail.

THIS was a rule nisi, for setting aside the proceedings on the bail bond, on the ground that the affidavit to hold to bail had been made by a plaintiff, stated to have been convicted of a conspiracy, and therefore incompetent to make an affidavit.

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E. Lawes shewed cause, and contended that assuming a person convicted of a conspiracy, in a matter not concerning the administration of justice, could not be considered as a competent witness in a Court of Justice, [which was a very disputable point,] still that objection did not apply here, because the deponent did not appear in the character of a witness, but merely as a suitor of the Court.

Chitty contrà urged that the rule by which a person convicted of a conspiracy was disqualified from giving evidence in a Court of Justice, was equally applicable to the maker of an affidavit to hold to bail. Staying the proceedings in this case would not operate as a denial of justice to the plaintiff, because there was nothing to prevent his suing the defendant by common process.

ABBOTT, C. J.—I am by no means prepared to say that a person convicted of a conspiracy is precluded from obtaining that justice which the law of the country affords to all his Majesty's subjects. But at all events this objection, supposing it to be valid, does not apply here, because the plaintiff does not appear in the character of a witness. He has made an affidavit of a debt due to him for the purpose of holding the defendant to bail; and I see no objection to the proceedings, on the ground of incompetency.

Rule discharged (*a*).

(*a*) Vide *La ville de Varsovie*, in the Admiralty, 13th May, 1817, and *Crowther* v. *Hopwood*, Dowl. & Ryl's. N. P. C. 5.

DOE *d.* REES *v.* THOMAS.

Thursday, February 12.

Though the Court will in general stay the proceedings in a second ejectment upon the same title, until the costs of the first are paid, still, it seems, that if the verdict in the first, was obtained by fraud and perjury, the court will not restrain the party from proceeding until the costs are paid.

W. E. TAUNTON had obtained a rule calling on the lessor of the plaintiff to shew cause why the proceedings in

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this ejectment should not be stayed until the costs of a former ejectment brought in the Court of Great Session in *Wales*, in which a verdict was found for the defendant, were paid, it being suggested that the present ejectment was brought on the very same title.

Russell now shewed cause, and contended that the rule upon which the Court acted, of staying proceedings upon a second ejectment until the costs of a former one for the trial of the same title are paid, was not inflexible, but was liable to certain exceptions. The ground upon which this case must be excepted was, that the verdict for the defendant in the former ejectment, had been obtained by fraud and perjury, as appeared by the affidavits now produced. The reason of the general rule laid down as to costs in ejectment was, that the party having once had a fair opportunity of trying his title, should not be at liberty to harass the defendant by a second ejectment until the costs of the first were paid. Here, however, the lessor of the plaintiff had, by the alleged misconduct of the defendant, been prevented from fairly trying his right, and therefore this was an answer to the present rule. The discovery of the fraud and perjury alleged, was not made until after the time allowed by the practice of the Court of Great Session in *Wales* for moving for a new trial had elapsed, and consequently the plaintiff had no means of obtaining justice by a new trial.

Taunton, in support of the rule, contended that the rule as to the staying of the proceedings until the costs of a former ejectment were paid, was inflexible, and the motion for costs was quite a matter of course. The reason suggested on the other side, might be good cause for moving for a new trial in the Court of Great Session, but was none in answer to the present application. This court could not now, upon affidavits, try the merits of the former ejectment, but must act upon the rule of practice which had been so long settled for the convenience of the suitors.

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The Court were of opinion, that the rule of practice adverted to, was not inflexible. If it were true, as was suggested, that the former verdict had been obtained by fraud and perjury, undoubtedly the rule for staying the proceedings ought not to have been granted. They suggested, however, that the whole matter should go before the Master, for him to determine whether it was a fit case to impose upon the plaintiff the terms of paying the costs of the former ejectment, before he should be at liberty to proceed to the trial of the present action.

Upon the Master's report the rule was afterwards made absolute.

Woolley v. Whitby.

Thursday, February 12.

A Judge's certificate that a trespass is wilful and malicious, to entitle a plaintiff to his full costs, under the 8 & 9 W. 3. c. 11. s. 4. need not be granted at the time of the trial in open Court, but may be granted at any time between verdict and final judgment.

THIS was an action of trespass for breaking and entering the plaintiff's close after notice; and on Not Guilty pleaded, the jury, at the last *Cheshire* Assizes, found for the plaintiff, damages five shillings. The plaintiff's counsel then applied to the Judges to certify, as for a wilful trespass, in order that the plaintiff might have his full costs under the statute 8 & 9 W. 3. c. 11. s. 4. The Judges (*Warren*, C.J. and *Marshall*, Serjt.) entertaining some doubt whether the case was within the statute, reserved the point for consideration, and no certificate was then granted; but in *Michaelmas* Term, application being made to *Warren*, C. J. (who had summed up the cause) a certificate was obtained. At this time *Marshall*, Serjt. was dead. The costs being taxed, were levied under an execution; and on a former day in this Term, *J. Williams* obtained a rule nisi for setting aside the certificate, judgment and execution, and to have the money levied returned to the defendant, on the ground that the certificate not having been granted *at the trial of the cause*, pursuant to the statute, it was inoperative.

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D. F. Jones now shewed cause against the rule. The objection to the certificate is, that it was not granted at the trial of the cause, but upon consideration of the language of the 4th section of the statute, and of the decisions which have taken place, it will be found that the objection ought not to prevail. Undoubtedly the case of *Ford* v. *Parr* (*a*) seems an authority in favour of the defendant, it having been there decided that the certificate must be granted at the time of the trial; but that case appears to have been hastily decided, for the Court are made to say that the statute requires "that the certificate shall be made in open Court at the trial," whereas the language of the statute does not warrant such a decision. All that the statute says is, that in all actions of trespass, wherein "at the trial of the cause it shall appear," and be certified by the Judge under his hand, upon the back of the record, that the trespass upon which any defendant shall be found guilty, was wilful and malicious, the plaintiff shall recover not only his damages, but his full costs of suit. It is clear, therefore, that *Ford* v. *Parr* must have been hastily decided, for the statute does not specifically point out at what time the Judge shall actually give his certificate. In Mr. *Tidd's* practice (*b*), it is laid down as the result of all the cases, that the certificate required by this statute, need not be granted at the trial of the cause; and he cites *Butler* v. *Cozens* (*c*) and *Swinnerton* v. *Jervis* (*d*). In the case of *Butler* v. *Cozens*, no doubt whatever seemed to have been entertained that under the statute 22 & 23 *Car.* 2. c. 9., the Judge might certify at any time after the trial. Now, from the reasonable interpretation of the 4th section of 8 & 9 W. 3., all that seems to be requisite is, that it shall appear *at* the trial of the cause, that the trespass was wilful and malicious, but the Judge may at any time *after* the trial, grant his certificate. [*Bayley*, J. There is a difference in the language

(*a*) 2 Wils. 21.
(*b*) 8th ed. 1000 & 1004.
(*c*) 11 Modern, 198.
(*d*) E. 22 Geo. 3. not reported, but cited in *Reynold* v. *Edwards*, 6 T. R. 11. vid. 7 T. R. 449.

of the 1st & 4th sections, which seems to authorize that construction. The first section provides, "That where several persons shall be made defendants to any action, &c. and any one or more of them shall be upon the trial thereof acquitted by verdict; every person so acquitted shall recover his costs in like manner, as if a verdict had been given against the plaintiff, and all the defendants had been acquitted, unless the Judge before whom such cause shall be tried, shall immediately after the trial thereof, *in open Court*, certify upon the record, under his hand, that there was a reasonable cause for making such person or persons a defendant or defendants to such action." The words here used are those which have been adopted in the report of *Ford* v. *Parr*, but the language of the 4th section is very different; for by that it is enacted "that in all actions of trespass wherein at the trial of the cause it shall appear, and be certified by the Judge under his hand, upon the back of the record, that the trespass, &c. was wilful and malicious, the plaintiff shall recover, &c." Now the words "wherein at the trial of the cause it shall appear and be certified by the Judge under his hand," may be merely a description of the person to make the certificate, namely the Judge who tried the cause, without any limitation of time within which the certificate shall be made.] Nothing can be more reasonable than that the Judge who tries the cause, should be at liberty to exercise his discretion within a reasonable time after the cause is tried, and not be compelled to give his certificate in open Court, upon the first impression which the proceedings at Nisi Prius may make upon his mind. The words of the statute will admit of this construction, and therefore this rule must be discharged.

J. Williams and *Campbell*, in support of the rule. The question is, what construction ought to be put upon this statute, which is at least a matter of considerable doubt. The position laid down by Mr. *Tidd*, namely, that the certificate required by the statute need not be granted at the

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trial of the cause, is certainly not borne out by the cases to which he refers. In *Swinnerton* v. *Jervis* and *Reynold* v. *Edwards*, the question was not as to the time when the certificate was to be granted, but as to the circumstances under which and in what cases the Judge was to exercise his discretion in granting a certificate. Those cases do not decide that the certificate may be granted at any time after the trial of the cause. In *Reynold* v. *Edwards*, the report of the decision of the Court is, that the rule was refused, the Court saying that it was settled in *Swinnerton* v. *Jervis*, in the *Common Pleas*, after much argument, that if it appear that the trespass, however trifling, was committed after notice, the Judge was bound to certify under the statute; and that it was proper to adhere to that as an universal rule; so that in point of fact there is no decision impeaching that of *Ford* v. *Parr*, which is expressly in point in support of this application. In *Good* v. *Watkins* (*a*), although the main point was as to the discretion to be exercised by the Judge in granting a certificate, still the case proceeded upon the supposition that the discretion was to be exercised at the time of the trial in open Court. It is laid down broadly in *Hullock* on Costs, that the certificate must be granted in Court at the trial, in order to make it available to the party in whose favor it is granted. This position, as well as the decision in *Ford* v. *Parr*, is fully justified by the language of the first section of the statute, which requires that the certificate shall be granted immediately after the trial in open Court; and as the 1st and 4th sections are in pari materiâ, they must receive the same interpretation. Under the statute 22 & 23 *Car.* 2. c. 9. the certificate may be granted at any time after the trial; but this statute requires that the certificate shall be made immediately after the trial in open Court. [*Holroyd*, J. The question here is, whether the expressions "wherein at the trial of the cause it shall appear" are to govern the words "and be certified."]

(*a*) 3 East, 495.

ABBOTT, C. J.—If this question had been decided by any clear and distinct report of any judgment of the Court upon it, or if the decision in *Ford* v. *Parr* had been acted upon in subsequent practice, I should have abided by such authority and practice. In the absence of any such authority and practice, I think we are at liberty to look into the act of parliament itself, and put such a construction upon it as appears best calculated to effectuate the intention of the legislature. I cannot consider the case in *Wilson*'s Reports as an authority on which we ought to rely, or as binding upon us, because, on looking into that Report, it is open at least to this supposition, that the attention of the Court had been directed, not to the 4th section of the 8 & 9 W. 3. c. 11. upon which this question arises; but to the first section, which is applicable to a totally different matter, namely, in what cases *defendants* shall be entitled to a certificate. In the report of the case, the Court is made to say, "that the certificate must be granted in open Court at the trial," which words are not to be found in the section upon which this question arises. It is certain that of late years the general opinion, both of the bar and the bench, has been, that a certificate under this statute might be granted at any time after the trial. It was so considered by the counsel in *Gundry* v. *Sturt* (*a*), and in *Good* v. *Watkins* (*b*), which came from the *Oxford* Circuit, and which was tried before Mr. Justice *Le Blanc*. That learned Judge thought that he might grant a certificate at any time after the trial; and said that, if bound by law, he would grant a certificate; but if not, he had expressed his determination not to do so. But in that case it never was made an objection that it could not be granted at any time after the trial. It is manifest, therefore, from both these cases, and from some others which might be mentioned, that the general opinion has been, that the certificate might be granted at any time after the trial. Let us look at the act of parliament itself. The first section provides that if there are several defendants in

(*a*) 1 T. R. 636. (*b*) 3 East, 495.

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the actions therein enumerated, and any one or more of them shall be acquitted by verdict, they shall have costs in like manner as if a verdict had been given against the plaintiff, and all the defendants had been acquitted, unless the Judge before whom such cause should be tried, shall, *immediately after the trial thereof in open Court*, certify upon the record under his hand, that there was a reasonable cause for the making such person or persons a defendant or defendants to such action or plaint. Upon that section there can be no doubt. The intention of the legislature is plainly expressed, that the defendant shall have his costs, unless the Judge shall, immediately after the trial in open Court, certify to the contrary. Then comes the 4th section, and it is said that we are to construe this in the same manner as the first, because they are both made in pari materiâ. But I do not feel that we are entitled to put the same construction upon both. On the contrary, I think that if in the same act of parliament one set of words is used in one section, and a different set of words is used in another section, relating to a similar subject, the probable conclusion is, that the legislature intended that a different construction should be put upon these different clauses; for if they intended that the same construction should be put upon the two clauses, we should have found some reference in the 4th section to what had been enacted in the first, by some such words as that the certificate should be granted "in the manner aforesaid." But there is no such reference to the first section. On the contrary, the 4th section contains an express enactment applicable to a different sort of case, for it enacts "that in all actions of trespass, wherein at the trial of the cause it shall appear and be certified by the judge under his hand upon the back of the record, that the trespass upon which any defendant shall be found guilty, was wilful and malicious, the plaintiff shall recover not only his damages, but his full costs of suit." Now I am of opinion, upon the construction of this section, that if it should appear to the Judge that the trespass was wilful and mali-

cious, the certificate need not be granted at the time of the trial in open Court, but may be granted at any intermediate time between verdict and judgment. That seems to me to be the best and most reasonable construction, because it enables the Judge to take a little time to consider in what manner his discretion shall be best exercised upon the whole review of the case, instead of calling upon him to act, perhaps, at a late hour of the night, when his attention is fatigued, and when he has not the best means of duly considering in what manner his discretion should be exercised. This appears to me to be the soundest and truest construction of the statute.

BAYLEY, HOLROYD, and BEST, Js. concurred.

Rule discharged with costs.

CRASWELL v. THOMPSON.

Thursday, February 12.

This Court cannot quash a Writ of Error upon a judgment of the C. P. of *Durham*, nor award execution upon the judgment, though the Writ of Error may have been brought against good faith.

CHITTY on a former day obtained a rule, calling upon the defendant to shew cause why the writ of error brought upon a judgment of the *Common Pleas* of the County Palatine of *Durham*, should not be quashed, on the ground that it was brought against good faith; and why the plaintiff should not be at liberty to sue out execution in this Court, notwithstanding the allowance of the writ of error.

Littledale, on shewing cause, was stopped by the Court.

Chitty, in support of the rule, contended, first, that the Court might quash the writ of error, on the ground that it was brought against good faith, and after the defendant had offered to pay the money; and second, that inasmuch as the writ of error had removed the proceedings of the inferior Court into this, it was competent for this Court to award

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execution upon the judgment. He cited *Cates* v. *West* (*a*), as an authority for shewing that where a writ of error is brought against good faith, the Court will not prevent execution issuing.

Abbott, C. J.—We have no authority to quash the writ of error, and it is quite clear that we cannot issue execution upon the judgment of an inferior Court.

Bayley, J.—You desire the writ of error to be quashed. The consequence of that would be, that the judgment below will stand good. Then the execution must issue out of the Court below. We cannot issue execution upon a judgment brought here upon error.

Best, J. (*b*) concurred.

Rule discharged with costs.

(*a*) 2 T. R. 183. (*b*) *Holroyd*, J. was gone to chambers.

Thursday, February 12.

Butt v. Vine.

Where a defendant gave a promise to pay a debt as to which he had been discharged under an Insolvent Act: Held, that he could not be arrested and held to bail upon such promise.

On shewing cause against a rule for discharging the defendant out of custody on filing common bail, the case was this: The defendant had been discharged under the Insolvent Debtor's Act, 1 *Geo.* 4. c. 119., as to a debt which he owed the plaintiff. After he was discharged he voluntarily proposed to pay the plaintiff ten shillings in the pound, in full satisfaction of the same debt. Upon this, the plaintiff, who treated it as a new promise to pay the debt, arrested the defendant, and held him to bail.

Platt shewed cause against the rule, and contended that the defendant might be held to bail upon his new promise, notwithstanding his discharge under the Insolvent Act.

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H. Cooper, contrà, relied upon *Wilson* v. *Kemp* (a), *Peers* v. *Gadderer* (b), as authorities for shewing, that whatever might be the defendant's liability to pay the debt upon the supposed promise, he could not be held to bail.

PER CURIAM. Where a party, discharged by his certificate, or under an Insolvent Act, voluntarily promises to pay a debt contracted previously to his bankruptcy or insolvency, he cannot be held to bail for such debt. He may liable to pay, but whilst his liability remains in dubio, he ought not to be detained in custody. But at all events here was only a proposal to pay ten shillings in the pound, and not a promise; and though a proposal to pay may be accepted, yet the party cannot be arrested under such circumstances.

Rule absolute.

(a) 3 M. & S. 595.

(b) Ante, vol. ii. 210. See *Horton* v. *Moggridge*, 6 Taunt. 563, and *Bayley* v. *Dillon*, 2 Burr. 736.

VANDERHADEN v. BRITTEN.

Thursday, February 12.

Where a defendant was arrested, and the sheriff's officer took money instead of a bail bond, from the defendant, and then wrote to the plaintiff that he could not find the defendant; and an alias writ was issued, to which cepi corpus was returned, the defendant being then in custody upon other process, and pending a body rule, the officer put in bail, and then brought up the defendant by habeas corpus, to be surrendered in discharge of his bail, the Court refused to relieve the sheriff, and granted an attachment.

IN this case the defendant had been arrested in *Trinity* vacation, but the sheriff's officer, instead of requiring him to give a bail bond, took money in lieu of bail, and in the month of *November* wrote to the plaintiff's attorney, stating that he could not find the defendant. Whereupon the plaintiff issued another writ, to which the officer returned cepi corpus; the fact being, that at the time of the return, the defendant was a prisoner in the King's Bench prison, upon other process. The body rule was served upon the sheriff on the 5th instant, returnable on the 11th, the defendant being then in custody. On the 9th the sheriff's officer put in bail, and now

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brought up the defendant by habeas corpus, for the purpose of surrendering him in discharge of his bail.

F. Pollock opposed the surrender of the defendant on the ground that the sheriff's officer having misconducted himself in originally taking money instead of a bail bond, he was not at liberty now to surrender the defendant under the circumstances stated.

Abraham contrà, produced an affidavit exculpating the sheriff from blame, and submitted that the sheriff ought not to be fixed in consequence of the culpable conduct of his officer.

PER CURIAM. The officer and the sheriff are the same person in the eye of the law. It is a great object with the Court to enforce performance of ministerial duties. If the sheriff's officer ventures to take money instead of discharging his duty by taking a bail bond, we will not relieve him. It is only by the pressure of being fixed in these cases, that he is prevented from doing the same thing in others. The refusal to relieve in this case will operate as security for his future good behaviour.

The defendant was remanded, and the Court granted an attachment against the sheriff, for not bringing in the body.

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JOHNSON v. STANTON.

Under the stat. 22 & 23 *Car.* 2. c. 9. a Judge's certificate for costs in actions of assault and battery, may be granted at any time between verdict and final judgment.

THIS was an action of assault and battery, and at the trial before *Hullock*, B. at the last assizes for *Shropshire*, the jury found a verdict for the plaintiff, damages one farthing.

Four days after the trial, the learned judge, who had not then quitted the assize town, granted a certificate under the 22 and 23 Car. 2. that an actual battery had been proved, so as to entitle the plaintiff to his full costs. The Master upon the taxation allowed the plaintiff his full costs accordingly.

W. E. Taunton on a former day obtained a rule nisi for the Master to review his taxation, on the ground that by the statute in question, the judge ought to have granted his certificate at the trial, in order to entitle the plaintiff to his full costs, and as the certificate had been granted four days after, it was void.

Campbell now shewed cause, and contended that the certificate had been granted in due time within the intent and meaning of the statute, which provides "that in all actions of assault and battery, wherein the judge *at* the trial of the cause shall not certify, &c. the plaintiff shall not recover more costs than damages." Now the expression "*at* the trial" could not be construed to mean, on the very day of the trial, but must be understood as leaving it in the discretion of the judge to grant a certificate at any time after the trial, and before final judgment. Here, in point of fact, the certificate was granted by the judge before he left the assize town; and at all events the judge was not tied down to the very moment the trial was over. In *Butler* v. *Cozens* (a) it was considered as a matter of course, that the judge might certify at any time after the trial, and the Court adjourned that very case to see if the judge who tried the cause would certify. The court will give the same liberal construction to the statute as they gave in the case of *Woolley* v. *Whitby*. (b)

Taunton, in support of the rule. *Butler* v. *Cozens* is no

(a) 11 Mod. 198.

(b) Ante, 147.

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authority to govern this case, because the question there arose upon the fourth section of 8 and 9 W. 3. c. 11. This application is founded upon the 22 and 23 Car. 2. c. 9. the language of which is very different. Reading the words of this statute according to the fair grammatical construction, the judge is "to find and certify the assault and battery sufficiently proved *at* the trial of the cause." According to the literal meaning of the words, "*at* the trial" imports immediately after the trial. The case of *Ford* v. *Parr*, though it arose upon the stat. 8 and 9 W. 3. c. 11. the words in which are a little different, applies in principle to the construction which ought to be given to this statute. [*Bayley*, J. The words of the first section there, are "immediately after the trial in open court," and there is some difference between the words "*after*" and "*at*."] At the trial means, in common understanding and grammatical construction, immediately after the trial, and therefore this certificate was not granted in time.

ABBOTT, C. J.—I do not think the words of this statute are to be distinguished in sense and substance from those of the fourth section of 8 and 9 W. 3. c. 11. It is very difficult to give them a literal construction. The judge cannot certify *at* the trial, because the verdict must be given and the trial over, and the verdict recorded, before he can certify. We must confine the words, "at the trial," to the finding of the verdict, but not to limit the certificate precisely to the day of the trial; because it is most convenient, upon a matter which is to be purely discretionary, that some convenient time should be allowed to the judge for consideration, in order that his discretion may be duly exercised. It is much better to lay that down as the safest rule of construction, than to say that the judge must act upon the immediate impression at the moment when the cause is ended. It seems to me therefore that we ought to put the same construction upon this statute that we have already put upon the statute of *William*. Convenience, and the reason of the thing, au-

thorize us to put this construction on these words, although they may be in some degree distinguishable from those in that statute.

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BAYLEY, J.—It is desirable to put the same construction upon this statute as we did upon the statute of *William*, although there may be some difference between the language of one and the other. The statutes 43 *Eliz.* c. 6 and 7 *Jac.* 1. c. 5. do not require that the certificate shall be granted at the trial. We have already decided that it is not necessary, under the statute 8 and 9 W. 3.; and the only cases in which it is necessary that it should be granted at the time of the trial are those mentioned in the first section of that statute, and that is, because the words there cannot be satisfied by any other construction, and because they deviate from the words used in the prior statutes, which I have mentioned.

BEST, J.—If this case were to be decided as a mere question of grammatical construction, I should put the same construction which Mr. *Taunton* puts upon the words of the statute, because when the judge "*at* the trial of the cause shall not find and certify," the grammatical construction is, that both these things should take place at the time of the trial. But so early as the 11th Modern Reports the determination put upon them is, that it is only necessary it should appear to the judge that the assault and battery was sufficiently proved, but that it is not necessary he should grant his certificate at the time of the trial. I agree that the construction now put upon this statute is the most convenient, because it gives the judge an opportunity of considering at his leisure whether the case is one in which he ought or ought not to certify.

Rule discharged without costs.

Holroyd, J. was gone to chambers.

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Thursday, February 12.

Coulson *v.* Hammond.

Where A. became bail to the sheriff upon a testatum capias against B. returnable the 13th, the 16th being the quarto die post, and the four days after the quarto die post expired on the 20th April, and A. became bankrupt on the 9th: Held that the bail bond was forfeited on the quarto die post, the other four days being allowed merely ex gratiâ, and that the penalty of the bond was a debt proveable under the commission, and was barred by the certificate.

WILDE, on a former day, obtained a rule nisi for setting aside interlocutory judgment signed against the defendant, for want of a plea, under the following circumstances:—*Joseph Brown* was arrested upon a testatum capias at the suit of the plaintiff, returnable in 15 days of Easter (13th *April*), the 16th being the quarto die post, and the four days after the quarto die post expiring on the 20th. The defendant became one of his bail to the sheriff and executed a bail bond for his appearance at the return of the writ. A commission of bankrupt issued against *Hammond* on the 19th *April*, under which he was duly declared a bankrupt and had since obtained a certificate. The sheriff executed an assignment of the bail bond on the 24th *April* to the plaintiff, who commenced this action on the bail bond, and signed interlocutory judgment against the defendant for want of a plea, and having been taken in execution on a ca. sa. on the judgment, the object of the present motion was to discharge him out of custody on the ground that the cause of action had accrued before the issuing of the commission by the forfeiture of the bail bond, and consequently the debt being proveable under the commission the defendant was protected by his certificate. The question was, whether, in point of fact, the bail bond was forfeited before the 20th of *April*, being the fourth day after the quarto die post?

R. Y. Richards now shewed cause, and on the authority of *Frampton* v. *Barber* (a) contended that the bail bond was not forfeited on the 19th of *April*, when the commission was issued, because, by the practice of the court, where the action is by original, the defendant has till four days after the quarto die post to put in bail.

Wilde, in support of the rule, was stopped by the Court.

(a) 4 T. R. 377. See *Dent* v. *Weston*, 8 T. R. 4.

Abbott, C. J.—We think that the bail bond was forfeited on the quarto die post, although ex gratiâ the defendant had till four days afterwards to put in bail.

Bayley, J.—We can only look to the condition of the bond. The condition is, that the defendant shall appear on a certain day; he does not appear by that day, and therefore the bond is forfeited.

Best, J. concurred.

Rule absolute.

Gainsford v. Carroll and others.

Thursday, February 12.

Where a contract for delivering a quantity of bacon by a given time was broken: Held, that the damages were to be estimated by the price of bacon of the same description at or about the time when the contract was broken, and not at the time when the damages were assessed.

Parke, on a former day, obtained a rule nisi for setting aside the inquisition of damages in this case, on the ground of misdirection on the part of the secondary. It was an action of assumpsit for the breach of three contracts entered into by the defendants with the plaintiff for the sale of fifty bales of prime singed bacon, to be shipped by them from *Waterford* in the months of *January*, *February*, and *March*, 1823, respectively. Judgment having been suffered by default, the secondary, upon the execution of a writ of inquiry in *London*, told the jury that in calculating the damages they were at liberty to do so according to the market price of bacon of the same kind and quality, on the day when the writ of inquiry was executed, and that the amount of their verdict was to be calculated by that criterion, and not according to the value of bacon at the time the contract was entered into. The jury acted upon this direction, and there being a difference between the then price of bacon, and the price at the time at which the contract was entered into, the plaintiff's damages were considerably increased. The objection to the secondary's direction was, that the plaintiff was entitled to recover the difference only between

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GAINSFORD v. CARROLL.

the contract price and the price which bacon of the same quality bore at or about the time when, by the terms of the contract, the plaintiff ought to have delivered the bacon.

Wilde now shewed cause, and contended that the direction of the sheriff as to the measure of damages was perfectly correct. The same principle ought to prevail in contracts of this nature as in the case of a contract to replace stock on a given day. In such cases it is not enough to take the value of the stock on that day if it has risen in the mean time, but the highest value at which it stood at the time of the trial or inquisition of damages. *Shepherd* v. *Johnson* (a) and *M'Arthur* v. *Lord Seaforth* (b). Now here, non constat that the plaintiff could have bought bacon of the same quality and goodness at the same price, at the time the contract was broken. The bacon was to have been of a peculiarly excellent quality, and as the defendants have broken their contract, they must take all the consequences resulting from their neglect, as if this were a stock transaction.

Parke, in support of the rule. This case is perfectly distinguishable from an action for the breach of an engagement to replace stock on a given day. Where a party lends another stock, to be replaced by a given day, he deprives himself of the beneficial use of his money, until the contract is fulfilled, and therefore he stands in a very different situation from a person who contracts for the purchase of goods by a given day; because until the contract is performed he is not called upon to pay any money, and therefore if the contract be broken, the measure of his damage must have reference to the price at which he might purchase goods of a similar quality and description. If the plaintiff were to have his damages assessed according to the value of a similar commodity at the time of the execution

(a) 2 East, 211. (b) 2 Taunt. 257.

of the writ of inquiry, great injustice might be done to the defendants, because he might chuse to delay his action and have his damages assessed just at a time of the greatest scarcity, and when the article was at the highest price. The true measure of damages is the difference between the contract price and that at which goods of a similar quality might be purchased at the time the defendants ought to have fulfilled their contract. This principle was laid down in *Leigh* v. *Paterson* (a), where an action was brought for the breach of a contract to deliver tallow.

ABBOTT, C. J.—I think the direction of the sheriff as to the measure of the plaintiff's damages was wrong. This is not at all like the case of a contract, to replace stock, because the lender, by the transfer, deprives himself of the use of the money in the interval, and the borrower has all the advantage of it; but in the case of a purchase of goods the vendee remains in possession of his money, and he has it always in his power to purchase similar goods as soon as the vendor fails in the performance of his contract. I think the under-sheriff ought to have told the jury, to calculate the damages not according to the price of similar bacon at the time the writ of inquiry was executed, but according to the price of bacon at or about the time when the contract was broken.

BAYLEY, J.—This is not like the case of a loan of stock. Here the plaintiff keeps his money in his pocket all the time, and when the contract was broken, he might have gone elsewhere, and might have got bacon ejusdem generis, although at a different price.

BEST, J. concurred.

Rule absolute.

(a) 2 J. B. Moore, 588.

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Thursday, February 12.

CARD and CANNAN *v.* HOPE.

Where *A.*& *B.* the husbands and managing owners of nine sixteenths of a ship under charter to the *East India* Company for six successive voyages, two of which had been performed, sold by deed, five sixteenths to *C.* and covenanted that the latter should be appointed to the command, and that they should continue to have the management of the ship as husbands, and should chuse the tradesmen and appoint all the officers, &c.: Held, that the deed was void, being founded on a contract for the sale of the shares coupled with a stipulation for the appointment to the command, and the continuance of the management.

Semble, that if the covenant to continue *A.* and *B.* as agents in the management of the ship, were independent, it would have been operative.

THIS was an action of covenant upon an indenture of agreement, dated 9th *December*, 1818. The declaration set out the indenture, which recited that plaintiffs were together legally entitled to, possessed of, and interested in nine sixteenth shares of the ship *Herefordshire*, then commanded by Captain *J. Money*, and under a charter party of affreightment to the *East India* Company for six successive voyages to and from the *East Indies*, two of which had been performed; that defendant had contracted with plaintiffs for the purchase of five sixteenth shares of the ship, at the price of 22,000*l.* and upon the terms thereinafter specified; that defendant should be appointed to the command of the ship so soon as she should have completed her then or next voyage under the charter party; and that plaintiffs, or one of them, or the survivor of them, should continue managing owners or owner of the ship; should effect all insurances to be made on the five sixteenth shares of the ship so agreed to be purchased by defendant, and conduct the other concerns of defendant as owner of the said five sixteenth shares, in manner thereinafter particularly described. The covenants were these:—That plaintiffs would sell to defendant, and defendant would purchase of plaintiffs five sixteenth shares of the ship free and clear of all debt, claim, demand, or liability of any kind whatsoever, up to the time of the ship's entering the dock for survey or repair previous to the commencement of her next or third voyage, for the sum of 22,000*l.* sterling, to be paid in manner therein mentioned; viz. the sum of 10,000*l.* part thereof, to be paid to plaintiff *Card* on a good and valid bill of assignment of the five sixteenth shares of the shi being duly executed by plaintiffs, or one of them, to a into the name of defendant, and the remaining sum of

12,000*l.* to be secured by the joint and several bond of defendant and such other persons as should be approved by plaintiffs, payable with interest at 5*l.* per cent. per annum, in the proportions and at the periods following; viz. the sum of 5,000*l.* part of the said sum of 12,000*l.* on the 19th *December*, 1820, and the residue on the 19th *December*, 1821. That plaintiffs, and the survivor of them, should be and continue managing owners or husbands, owner or husband, of the ship, so long as they or he should be desirous to continue, and should faithfully and to the best of their or his ability, attend to and conduct the concerns of the ship. That so soon as the ship should have completed her next or third voyage, defendant should, if that event should not already have happened, be appointed to the command on all her future voyages, both during the continuance of the then charter party, and such other voyages as, after the expiration or other determination thereof, she might undertake to perform. That plaintiffs, or the survivor of them, as such managing owners or owner, would do all necessary acts to have defendant effectually invested with the command of the ship, according to the rules of the *East India* Company's service; that defendant should have and enjoy all the usual advantages appertaining to or to be derived from such appointment and command; that in case defendant should from ill health, or from any other cause, retire from and resign the command, or should die before he should be appointed to or assume the command, or while holding the same, or as the case might be, plaintiff *Card* should be at liberty to appoint a fit and proper person to succeed defendant upon such terms as might be approved by defendant, his executors, &c. or upon such terms as defendant, his executors, &c. might be able to obtain on the appointment of such successor; that in case plaintiff *Card* should decline to appoint such successor on the terms aforesaid, then defendant, his executors, &c. should be permitted to appoint a fit and proper person to the command of the ship; and that such person so appointed should be entitled to all

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the advantages that defendant would by the said indenture be entitled to, in right of such command; and that the managing owner for the time being should perform all the stipulations and agreements for the benefit and advantage of such person appointed as last aforesaid, that defendant would be entitled to demand, if holding and in the command of the ship. That plaintiffs, or the survivor of them, as such managing owners or owner, should be allowed for all expenses properly incurred in the management and conduct of the concerns of the ship, and a commission of 2*l*. 10*s*. per cent upon all monies and freight received on account of the owners of the ship; and in consideration thereof, that they, as such ship's husbands as aforesaid, would keep proper books and accounts of all transactions entered into and carried on for and on account of the owners, in respect to the management and concerns of the ship, as he or they might from time to time require. That plaintiffs, or the survivor of them, as such managing owners or owner, would from time to time give credit to defendant and the other owners of the ship, for all monies, profits, and emoluments received for and on account of the ship and the owners thereof, and would give credit and allow to the owners all discounts and allowances employed for and on account of the ship. That plaintiffs, as merchants and copartners, or the survivor of them, should from time to time be employed as the agents of defendant in the concerns of the ship, and effect all insurances to be made on his five sixteenth shares thereof, and on all such investments on the several outward and homeward voyages as he might from time to time make and have on board the ship, whether consisting in goods or specie. That plaintiffs, or the survivor of them, as such managing owners or owner, should have the right of appointing all the other officers to serve on board the ship; and that defendant would on such appointment, from time to time, and at all times thereafter, present all and every such officers to the Court of Directors of the *East India* Company, in order to their being con-

firmed in their respective stations. That plaintiffs, or the survivor of them, should appoint the several tradesmen and artificers for the outfit and repairs of the ship on her several voyages, so long as the said last mentioned right of appointment was exercised by plaintiffs and the survivor of them, to the best advantage of defendant and the other owners of the ship. That in case defendant, or his heirs, executors, &c. should be desirous to sell the whole or any of the said five sixteenth shares, that he or they should be at liberty so to do, upon the condition and express proviso that any person or persons purchasing the whole or any of the said shares, should abide by and perform all the terms, conditions, stipulations, contracts, and agreements therein before expressed, declared, and agreed, and should do no act or deed to remove plaintiffs or the survivor of them from being managing owners or owner of the ship, or the agents or agent of the then or any future Captain, so long as they continued to observe all the covenants, stipulations and agreements to be performed on their part; and that such purchaser or purchasers should sign a memorandum, to be subscribed to the said indenture, agreeing to be bound and concluded thereby, to all intents and purposes, as defendant, his executors, &c. would be bound and concluded, had he or they still held the said shares. There was also a covenant to refer all disputes that might arise to arbitration. Averment of performance of covenants by plaintiffs. Breach, first, that defendant did not allow plaintiffs to continue managing owners, but, on the contrary thereof, removed them; second, that defendant did not employ plaintiffs as his agents in the concerns of the ship; and third, that defendant refused to refer some disputes which had arisen, to arbitration. Pleas to the first breach, the bankruptcy of plaintiff *Card;* the first alleging that by reason thereof plaintiffs became and were incapable of attending to and conducting the concerns of the ship as managing owners and ship's husbands, according to the form and effect of the indenture; and the second, that by reason of the said bankruptcy, de-

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fendant became and was released from the covenants. Similar pleas to the second breach, demurrer to these pleas, and joinder in demurrer.

The case was argued on demurrer, by *J. Evans* for the plaintiffs, and *Kaye* for the defendant, in *Michaelmas* Term last, when the question was, whether the bankruptcy of the plaintiff *Card* was a defence to the action; and the following cases were cited on the part of the plaintiff; *Chippendale* v. *Tomlinson* (a), *Silk* v. *Osborn* (b), *Evans* v. *Brown* (c), *Fowler* v. *Down* (d), *Webb* v. *Fox* (e), *Flood* v. *Finlay* (f), *Clark* v. *Calvert* (g), *Wetherall* v. *Geering* (h), *Brooke* v. *Hewitt* (i), *Boot* v. *Wilson* (k), and *Mills* v. *Auriol* (l); but, the court having, in the course of the argument, suggested a doubt whether the deed itself was not void, upon the ground that the main object it had in view was to buy and sell the appointment of a particular person to the command of a ship then chartered for several successive voyages, directed that the case should be argued again with reference to that point; and it was accordingly argued again on a former day in this Term.

Kaye, for the defendant. This deed is void. It is founded on the sale of the command of the ship; and part of the consideration for the defendant's covenant to continue the plaintiffs as managing owners is the appointment and continuance of the defendant as commander. It will be contended that though part of the deed may be void, the residue may still be good; but if the whole deed rests upon a fraudulent foundation, it is void in toto. Now, the foundation of the deed is that the defendant shall have the command of the ship, which is fraudulent in three

(a) 1 Cooke's B. Laws, 406.
(b) 1 Esp. 140.
(c) Id. 170.
(d) 1 Bos. & Pul. 44.
(e) 7 T. R. 391.
(f) 2 Ball & Beatty, 15.
(g) 3 J. B. Moore, 96.
(h) 12 Vesey, 504.
(i) 3 Id. 253.
(k) 8 East, 310.
(l) 1 H. Bl. 433.

respects; it is a fraud, first, upon the *East India* Company; second, upon the other part owners; and third, upon public policy. It is evident from the recitals of the deed that the stipulation for the defendant to have the command, is a part of the original contract, and the consideration for that command must have been, either that he paid a larger sum for the shares than they were intrinsically worth; or that he covenanted to continue the plaintiffs as the managing owners; by either of which means the plaintiffs obtained a profit by the sale of the command which by the rules of the *East India* Company's service they cannot do. Had the contract been made by parol instead of by deed, and the defendant had sued the plaintiffs for a breach of it in not appointing him to the command, his declaration must have averred, that in consideration that the defendant had purchased the shares, and had agreed to continue the plaintiffs as managing owners of the ship, the plaintiffs had undertaken to appoint him to the command—a contract which, it is clear from the case of *Blachford* v. *Preston* (a), would have been illegal and void. Then the deed is a fraud upon the other part owners, and upon the *East India* Company as the charterers, for both those parties have an interest in the appointment of proper officers, and have a right to see that a fair and impartial judgment is exercised in their selection. The power of appointing officers ought to reside in the majority of the holders in point of value; but here the contract deprives them of that power, and vests it in an individual who is the holder only of five sixteenths. The charterers also are equally injured by such an arrangement, because they are entitled to the unfettered judgment of the persons in whom the appointment of officers ought to vest. All these reasons would be equally strong to shew that the contract operated in violation of public policy, and therefore in every view of the case the deed is void, and the judgment of the court must be for the defendant.

(a) 8 T. R. 89.

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J. Evans, contrà. Contracts similar to the present are in universal use among ship-owners connected with the *East India* Company's service. The other part owners, therefore, must be taken to have been acquainted with the usage, and this contract consequently could not be a fraud upon them. Neither could it be a fraud upon the charterers. The argument on the other side is founded upon the assumption of facts, not one of which appears upon the face of the record. There is nothing in the deed to shew that there was any contract for the sale of the command, and the plaintiffs are entitled to the benefit of the established rule of law which says, that a party shall be presumed to have acted legally and bonâ fide, until the contrary is clearly shewn. It is said that the defendant paid a larger sum for his shares than they were really worth, but there is no evidence of the fact; and at any rate, the covenant to appoint him to the command is an independent covenant, and, taken per se, has nothing of fraud or of illegality in it. Then what does the covenant to continue the defendant in the command amount to? It is in fact a nullity, for without the consent of the *East India* Company the owners have no power to remove the captain; it may therefore be treated as surplusage. Undoubtedly *Blachford* v. *Preston* (a) is an authority to shew, that the sale of the command of a ship in the service of the *East India* Company is illegal; but that was decided upon the ground that there was evidence that such a contract was contrary to the bye-laws of the Company: here, the bye-laws are not set out on the record, and the court therefore cannot take judicial notice of them, even assuming them to be the same now, which they were when that case was decided, of which, however, there is no proof adduced. The covenant that the plaintiffs should have the appointment of the other officers is also consistent with the known and invariable usage of the trade, and can be productive of no mischief, because no officer can be appointed, without previ-

(a) 8 T. R. 89.

ously submitting to an examination before the Company, and being approved by them. With respect to the commission to be charged by the plaintiffs, and the profit thereby accruing to them, it is clear from the case of *The Attorney-General* v. *Borradaile* (a), that the managing owners are entitled as of right to a commission. It has been truly said, that the majority of the part owners ought to have the appointment of officers; then the plaintiffs, as owners of nine sixteenths, were entitled to appoint, and therefore they acquired no larger powers by means of the agreement than they previously possessed. If by appointing the defendant to the command they practised a fraud upon the other part owners, their possession of nine sixteenths, which gave them the power of so appointing him, was in itself a fraud also; because it also gave them the power of appointing themselves managing owners; and having that power, they were surely at liberty to sell a portion of their interest in the ship, with a reservation to themselves of the privilege of continuing to be the managing owners. Had the ship been chartered in the ordinary way, and not by the *East India* Company, it is quite clear that the owners might have appointed all the officers, unless there had been an express agreement to the contrary, and then, it seems that the right of appointment would have vested in the captain. *Rosiere* v. *Sawkins* (b). [*Bayley*, J. That was the case of a sole owner, and therefore is distinguishable from the present.] The owner of the majority of the shares stands precisely in the same situation as a sole owner, for he has the same rights and powers, and is equally free to exercise them. The declaration here makes no mention of the *East India* Company, and therefore the case is in all respects the same as if the ship had been chartered in the common way. But, the exercise of this power by the plaintiffs, as the largest part owners, was much less likely to produce mischief in the service of the Company, than it would be in any other service, because the selection

(a) 1 Price, 148. (b) 12 Mod. 431.

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of the voyage, and the final approval of the officers, here rested with the charterers, which in an ordinary case they would not. Above all, it should be remembered, that if this be a question of fraud, it is peculiarly a question for a jury, and ought not to be decided by the Court, because where the fraud, as in this case, is not apparent, the Court cannot and will not presume it.

Kaye, in reply, re-urged the grounds upon which he originally relied.

The Court took time to consider of the case, and judgment was now delivered by

ABBOTT, C. J. who, after adverting to the pleadings, and recapitulating the contents of the deed, said, We are of opinion that this deed is illegal and void, and that judgment must be entered for the defendant, on the ground of the insufficiency of the declaration. The deed is an agreement for the sale of five sixteenth shares in the ship by the plaintiffs to the defendant, the former being at the time the managing owners or husbands of the ship. The fundamental articles of the agreement are, that the defendant shall be appointed to the command of the ship; that the plaintiffs shall continue the managing owners or husbands of the ship, so long as they discharge their duties as such faithfully and to the best of their abilities, and shall chuse the artificers, and appoint the officers for the ship; that if the defendant shall resign the command, or be removed from it by death or otherwise, the plaintiffs shall appoint a person to succeed him, subject to the approval of himself or his executors, upon such terms as he or they may be able to obtain, or that he or they shall nominate a fit person in his stead; that the plaintiffs shall be employed by the defendant as his agents in the concerns of the ship; that the defendant may, if he shall be so minded, sell all or any of his five sixteenth shares, provided that the purchaser shall abide by the con-

ditions of the deed, and shall not remove the plaintiffs from being the managing owners so long as they shall perform the agreement on their part; and that the purchaser shall sign a memorandum to be subscribed to the deed, agreeing to be bound and concluded thereby, as much as the defendant would have been if he had continued in possession of the five sixteenth shares. This, therefore, is, in substance, an agreement by the major part owners of the ship when selling a part of their interest, that the purchaser shall have the command of the ship at sea, and the sellers the management of her in port, together with the appointment of all the other officers, and the selection of the tradesmen to equip and repair her; and this we must presume was made without the privity of the other part owners, first, because no such privity is expressed by the deed, and second, because some of them must have concurred with the defendant in removing the plaintiffs from the management of the ship, inasmuch as his interest in her, taken alone, would have been inadequate for that purpose: and we also find that it was made at a period when the ship was under charter for six successive voyages, two only of which had been performed. The covenant by the defendant, to continue the plaintiffs as his agents in the management and concerns of the ship, might, if it stood independent, be a legal covenant; but if its foundation is illegal, it becomes invalid, and cannot be enforced by law; and we are of opinion that the contract for the sale of the shares, coupled with the appointment to the command and the continuance of the management, is the foundation of that covenant, and is an illegal contract, and void. It is well known that the command of a ship in the *East India* Company's service, and the management of such a ship as husband, are situations of very considerable value, and it is impossible to read this deed without perceiving that it is a contract for a profit to accrue to the plaintiffs from the appointment of the defendant to the command, the shape of that profit being either a larger price for the five shares than they were really

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worth, or their own continuance in the management of the ship; or, as is most probable, partly both. We are of opinion, that such a contract is contrary to the interests both of the charterers and the other part owners, and therefore void. It may be true, as has been alleged in argument, that the Court of Directors of the *East India* Company have a veto in the appointment of every officer in their service, by whomsoever nominated; but that, we think, does not alter the case; because the Company have a right to be protected, not only by such examination and inquiry as they can make into the fitness of the individuals nominated by the owners, but also by the condition of a free, impartial and disinterested recommendation by the owners, of persons to whom it is proposed to confide a charge so important, as the command and navigation during a long and distant voyage of a ship freighted with a very valuable cargo, and having also on board a numerous crew and many passengers. It has also been argued on behalf of the plaintiffs, that we cannot take judicial notice of the bye-laws or regulations of the *East India* Company touching this subject, because they are not set out upon the record, beyond which our attention must not travel; and to that argument we fully subscribe; but whether we regard the *East India* Company as being, in the language of Lord *Kenyon* in *Blachford* v. *Preston* (a), a limb of the government of the country; or, according to the definition of Mr. Justice *Lawrence* in the same case, such a body, that no distinction can be established between offices held under that Company, and those held under government, as far as respects this purpose; or whether we regard them merely as a Company of private merchants, being in the situation of charterers of a ship; our opinion upon this case will be precisely the same: because we think that a contract like this, made with reference to a ship actually engaged in a particular service, is contrary to the interests, both of the charterers and the other part owners, and consequently illegal and void.

(a) 8 T. R. 89.

It is a striking feature in our national policy to hold out every encouragement to the equipment and employment of trading vessels, and with that view the law empowers the majority of the part owners, though under restrictions guarding the interests of the minority, peculiar to itself, to employ the ship even against the wishes of the minority, in order that the ship may not remain unemployed. The act of vesting that power in the majority, certainly seems to imply the further power of appointing officers, and the usage undoubtedly is for the majority to exercise that power; but concomitant with that power is an important duty, namely, to exercise a free and unbiassed judgment in the selection of every individual to whom the management of the equipment and the navigation of the ship are to be confided, ut dentur digniori. Now any contract which is calculated to fetter or pervert the judgment, and to compel the party under peril of an action to concur in the appointment of particular persons, is a violation of that duty; and such a violation of duty becomes the more gross and offensive when the foundation of the contract is the acquisition of extraordinary profit to the contractor; because all the part owners are entitled to share rateably in all the profits arising from the employment of the ship. Again, this duty is owing, not to the charterers and other part owners only, but to every one who has any stake in the ship in respect either of life or property; and therefore a violation of it is contrary not only to the interests of the charterers and part owners, but to another and still more important object, namely, the safety and protection of the lives and property embarked in the voyage. It has been already observed, that though the charterers of this ship may have an ultimate control over the appointment of the officers, they are still entitled to the benefit arising from a free and unbiassed selection of the persons presented for their approval. It may be true, with respect to the other part owners, that as they became owners at a period when the majority of the shares had vested in the plaintiffs, they

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must have known that such a majority included, as against them, all the powers and privileges for the continuance of which the deed provides; and yet the interest which the plaintiffs had in the ship being superior to all other considerations, might naturally lead them to anticipate an honest and impartial application of all those powers and privileges. But the security thus afforded them would be greatly diminished by this deed, because, while it lessens the interest of the plaintiffs in the ship, it continues to them almost all their powers in the management of her, and may by a farther alienation of their own present interest, and of that which they have transferred to the defendant, if made under stipulations and conditions such as are contained in this deed, eventually vest the entire management of the ship, both at sea and in port, in persons possessing a very trifling interest in her. The deed therefore is calculated to take both from the charterers and the other part owners, that security to which they are entitled, and upon which it is evident they must have relied when they respectively assumed those characters. For these reasons we are of opinion that judgment ought to be entered for the defendant.

Judgment for the defendant.

END OF HILARY TERM.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH

IN

EASTER TERM,

IN THE FIFTH YEAR OF THE REIGN OF GEORGE IV.

MEMORANDA.

1824.

IN the course of the last vacation, The Right Honourable Sir *Thomas Plumer*, Knight, Master of the Rolls, died at his house in the Rolls Yard, Chancery Lane.

The Right Honourable Lord *Gifford*, Lord Chief Justice of the Common Pleas, was appointed Master of the Rolls, and took his seat at the Rolls on the first day of this Term.

Sir *William Draper Best*, Knight, one of the puisne Judges of this Court, was appointed Lord Chief Justice of the Common Pleas, and took his seat in that Court on the first day of this Term.

Joseph Littledale, Esq. of the Honourable Society of Gray's Inn, Barrister at Law, was appointed one of the puisne Judges of this Court, in the room of Sir *W. D. Best*, Knight; and being called to the degree of a Serjeant at Law, gave rings with the motto, "*Regi regnoque fidelis.*" On the first day of this Term he took his seat on the Bench.

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William St. Julien Arabin, Esq. of the Honorable Society of Inner Temple, Barrister at Law, was called to the degree of a Serjeant at Law, and gave rings, with the motto, "*Regi regnoque fidelis.*"

Thomas Wilde, Esq. of the Honorable Society of Inner Temple, Barrister at Law, was called to the degree of a Serjeant at Law, and gave rings, with the motto, "*Regi regnoque fidelis.*"

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KNOTT v. FARREN.

Wednesday, May 5.

Where upon demand made of payment of two promissory notes over due ten years, the defendant said, "I cannot afford to pay my new debts much less my old ones:" Held, that the jury were warranted in negativing this as evidence of a subsisting debt to take the case out of the statute of limitations.

ASSUMPSIT upon two promissory notes, made ten years since, by the defendant, payable to the plaintiff. Pleas, first, non assumpsit, and second, the statute of limitations; and issue thereon. At the trial, before *Best*, J., at the last *Sussex* Assizes, the evidence on the part of the plaintiff to take the case out of the statute was, that the defendant on being applied to for payment of the notes, declined, saying, "I cannot afford to pay my new debts, much less my old ones." It was contended that this was, in point of law, such an acknowledgment of the existence of the debt as barred the statute and would support the action, and *Dowthwaite* v. *Tibbut* (a) was cited as a case in point. For the defendant it was urged, that in order to take a case out of the statute, there must be an explicit declaration that the debt remains unpaid, coupled, either with a promise to pay it, or an avowal of inability to do so; and *Coltman* v. *Marsh* (b) and *Leaper* v. *Tatton* (c) were quoted as authorities. The learned Judge intimated a belief that *Dowthwaite* v. *Tibbut* had since been overruled, and was inclined to think upon the authority of the cases cited for the defendant that there was no case to go to the jury; but he ultimately left it to the jury to say whether the defendant's words amounted to an acknowledgment that the debt was subsisting. The jury found for the defendant.

Long now moved for a new trial, and relied upon *Dowthwaite* v. *Tibbut* as an authority which had not been overruled. That was an action for seaman's wages, and the acknowledgment relied upon was, "I will not pay; there are none paid, and I do not mean to pay unless obliged; you may go and try;" and the Court there held these ex-

(a) 5 M. & S. 75. (b) 3 Taunt. 380. (c) 16 East, 420.

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pressions to be quite sufficient to take the case out of the statute. The cases cited for the defendant at Nisi Prius are distinguishable from this, because in each the expressions amounted to a complete denial that the debt was due. Here it is impossible to put any other construction upon the defendant's words, than as amounting to an acknowledgment of a subsisting debt.

PER CURIAM. This was a question for the decision of the jury, and by their finding they have negatived the acknowledgment. Every word that the defendant uttered may be true, and yet, consistently with the import of his language, these notes may have been paid.

Rule refused. (a)

(a) Vide 4 East, 546.

Thursday, May 6.

SCUERHOP v. SCHMANUEL.

An affidavit of debt stating that A. was indebted to B. for goods sold and delivered in *Holland*, and that the debt was assigned to C. according to the laws of *Holland*; concluding with a statement that the assignee of a debt may sue the debtor according to the laws of *Holland* "as deponent is informed and believes;" is sufficient to hold the defendant to bail in this country.

C. CRESSWELL moved to discharge the defendant out of custody on filing common bail, on the ground of the insufficiency of the affidavit of debt. The affidavit stated "that the defendant was indebted to *W. L. Mier* of *Amsterdam* for goods sold and delivered to him in *Holland*, and that the said debt was assigned to deponent by the said *W. L. Mier* according to the laws of *Holland*, and that an assignee of a debt may sue the debtor, according to the laws of *Holland*, as the deponent is informed and believes." This affidavit, it was contended, was insufficient to hold the defendant to bail in this country, for two reasons; first, that though the assignment of the debt was stated to have been made in *Holland*, yet there was no consideration shewn for such assignment; and second, that there ought to have been some better evidence of the law of *Holland* than the deponent's information and belief.

ABBOTT, C. J.—There may be some doubt whether the

action is maintainable; but we shall not decide that question on motion. It is clear, from the affidavit, that the defendant is liable to pay somebody, and therefore he is liable to be arrested. The only question is, whether the plaintiff is the proper person to arrest him. On the trial, the plaintiff may give evidence of what the law of *Holland* is, but his information and belief at present is enough for this purpose. Information and belief is sufficient in an affidavit to hold to bail at the suit of executors, or the assignees of a bankrupt. The only point here is, whether the defendant should be arrested by A. or B. and we think this affidavit is sufficient.

The other Judges concurred.

Rule refused.

SIMPSON *v.* ROUTH and others.

Thursday, May 6.

A formal demand is necessary before an action can be maintained against overseers for the surplus arising from a distress for poor's rates, under 27 G. 2. c. 20. s. 2; and a plea of tender, which is found not to cover the plaintiff's demand, will not cure the objection.

ASSUMPSIT for money had and received. Pleas, first, the general issue; and second, a tender, and issue thereon. At the trial before *Holroyd*, J. at the last *Yorkshire* Assizes, the case on the part of the plaintiff was this: The defendants, being overseers of the parish of *Hemmingbrough*, of which the plaintiff was a rated inhabitant, had distrained the goods of the plaintiff, by virtue of the warrant of a Justice of Peace granted to them pursuant to the statute 27 Geo. 2. c. 20. for arrears of poor's rates. The levy and sale were regularly conducted, and after payment of the arrears of rates, and of the expenses attending the distress, &c. a surplus remained in the hands of the defendants, for which the action was brought. It was found by the jury that the defendants' plea of tender did not cover the whole of the plaintiff's demand, but in fact left a balance of thirteen shillings still due to him. It was contended,

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however, for the defendants, that the plaintiff must be nonsuited, inasmuch as there had been no formal demand of the surplus before action brought, pursuant to sec. 2. of the statute. The learned Judge thought the objection tenable, and nonsuited the plaintiff, with leave to move to enter a verdict for thirteen shillings, if the Court should be of opinion that a formal demand was not necessary.

D. F. Jones now moved accordingly to set aside the nonsuit and enter a verdict for thirteen shillings. It was quite clear that previous to the passing of the statute the action would have been maintainable at common law without a demand, and as the statute contained no express provision that a demand should be made, none was now necessary. But if the second section could be construed as implying the necessity of a demand, still it could mean only such a demand, as the action itself imported. To call upon a plaintiff under such circumstances to make a formal and specific demand, would be to impose great hardship and inconvenience upon him, because it was out of his power to ascertain what precise sum remained in the hands of the parish officers, whereas they must, from their situation and office, know what the surplus really was, and could not in fact require any information or notice from the plaintiff on that subject. [*Bayley*, J. A general demand of the surplus, if any, might be sufficient, but surely the parish officers are entitled to some notice before they are burdened with the consequences of an action.—*Abbott*, C. J. The plaintiff need not be in any uncertainty as to the amount of the surplus, because the statute authorizes him to have a copy of the account. Besides is it quite so clear that a demand was not necessary at common law before the passing of the act?] *Umphelby* v. *M'Lean*, (*a*) seems decisive to shew that no notice or demand was requisite, either with or without reference to this act of parliament. [*Bayley*, J. That was a very different case from the present. The action there

(*a*) 1 B. & A. 42.

was founded upon a different act of parliament, and was brought to recover the amount of an excessive charge made by the defendants as tax-collectors, for the expenses of the distress.] The cases in principle are the same; there the defendants improperly withheld a sum of money under the pretence of its having been expended in the costs of the distress; and here the defendants withhold the sum of thirteen shillings which the plaintiff claims as the surplus in their hands, on pretence that a smaller surplus is in fact due. It was the duty of the defendants, so soon as the account was made up, to pay over the balance to the plaintiff, and "where a mere duty is promised to be paid upon request, no actual request is necessary, but the bringing of the action is a sufficient request." *Birks* v. *Trippett* (*b*). Upon this latter authority it is clear that the present action is maintainable.

ABBOTT, C. J.—It is not necessary to decide how the law stood with reference to the question now raised, before the passing of 27 Geo. 2. c. 20. because it is quite clear, from the language of the second section of that act, that a demand of the surplus claimed must be made before the action for the recovery of it is brought. The words are, "the overplus (if any) after such charges, and also the said penalty or sum of money, shall be fully satisfied and paid, shall be returned, *on demand*, to the owner of the goods and chattels so distrained," which must necessarily apply to a demand made before action brought. Such a provision was quite requisite for the protection of parish officers from unfounded and vexatious suits at law. The party distrained upon may, before the account is made up, remove to a distant part of the country, and then, if no demand were necessary, the only means by which the parish officers could secure themselves from an action, would be to seek out the party at whatever distance, and tender him the overplus, which would be an unjust and insupportable

(*b*) 1 Saund. 32.

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burden. This case does not fall within the rule laid down in the case cited from *Saunders;* for here, until a demand has been made, no duty attaches upon the officers to repay the balance, and consequently no action can lie to recover it. The fact of the tender made by the defendants, does not seem to me to vary the case, because a tender does not confer upon the plaintiff a right of action for a larger sum than that actually tendered, and cannot be construed as an admission of a debt due beyond that sum; but here the plaintiff has declared upon a debt exceeding the amount of the tender. For these reasons I am of opinion that the nonsuit was right.

BAYLEY, J.—I have no doubt upon this act of parliament, that a previous demand was necessary to entitle the plaintiff to recover; and I am very much disposed to say, that if there had been no such provision in this act, a demand would have been equally necessary at common law. There is no express contract existing between these parties; there is no duty or obligation resting upon the defendants ex contractu. In distraining something more than the precise sum requisite to cover the arrears, the parish officers act from unavoidable necessity, and they are entitled therefore to notice before they are visited with the burdensome consequences of an action. They are acting in the discharge of a public duty, and are not bound to travel all over *England* to pay over the surplus remaining in their hands. It is said that bringing the action is a sufficient demand. If that be so, then the overseers will always be liable, for levying a farthing more than is due, to pay the costs of the commencement of an action. That would be a most unreasonable proposition. The only difficulty that presses upon my mind arises from the proof of the tender. The object of the legislature in providing that a demand should be made, was to prevent litigation, by enabling the officers to refund the overplus before any action is commenced. Where a demand has been made, it clearly be-

comes their duty to pay over the whole surplus, and if, without any demand, the defendants thought proper to tender less than was really due, I confess that, as at present advised, it seems to me that no subsequent demand would be necessary, at least for the sum actually tendered. Upon this particular point I entertain considerable doubt, and therefore give no decided opinion; but upon the general question I fully concur with my Lord Chief Justice in thinking that the plaintiff was properly nonsuited.

LITTLEDALE, J.—I think a previous demand of the overplus was necessary to support this action. There was no duty ex contractu imposed upon the defendants, arising from the nature of the dealings between the parties; if there had been, the case would have stood on very different grounds. The statute expressly requires a demand. If the defendants had neglected a duty to pay this money which attached upon them ex contractu, the action would have been a sufficient demand, even within the statute; but where the defendants owe only a public duty, an actual demand is necessary, in order to make that duty attach. With respect to the tender, I agree with my Lord Chief Justice, that it makes no alteration in the case, because the tender of a smaller sum is no admission of a larger sum being due, as has been recently decided (a). It only admits the defendant's liability to pay so much money. On both points, therefore, I concur in thinking that this action is not maintainable.

HOLROYD, J., said he was of the same opinion, and added, that at the trial he had at first declined to nonsuit, in order to give the plaintiff an opportunity of entering into the items of the account, intending to reserve the question of formal demand, for the opinion of the Court. It appeared, his Lordship said, that the sum tendered was refused by the plaintiff, not on the ground of its being too small, but because it was tendered too late.

Rule refused.

(a) Vide *Rivers* v. *Griffiths*, ante, vol. i. 215.

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Where a defendant was arrested for a debt of 15*l.* and paid into Court 6*l.* which the plaintiff took out, and dropt the action: Held, that although the defendant had offered to pay the 6*l.* before action brought, he was not entitled to have his costs taxed under 43 Geo. 3. c. 46. s. 3.

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THE defendant was arrested for 15*l.* and upwards, upon a debt in fact not amounting to that sum, and paid 6*l.* into Court, which was taken out by the plaintiff, and further proceedings in the action dropt. *Hutchinson* now moved, upon the 43 Geo. 3. c. 46. s. 3. for a rule, calling on the plaintiff to shew cause why the defendant should not have his costs taxed; and produced an affidavit, stating the facts above-mentioned, and also that the defendant had offered to pay the 6*l.* before the plaintiff brought his action. He contended that this case was distinguishable from *Rouverroy* v. *Alefson* (*a*), inasmuch as there the application was refused on the ground that no vexation was shewn in the conduct of the plaintiff, whereas here it was not only apparent from the facts, but it was also sworn by the defendant, that there was no reasonable or probable cause for the arrest. (*b*)

ABBOTT, C. J.—Where the cause is stopt upon the defendant's paying money into Court, the statute does not apply; nor can the conduct of the plaintiff be considered vexatious, so far as to warrant us in granting a rule of this nature against him. Many circumstances may induce a plaintiff to prefer taking the money out of Court, and contenting himself with that amount for which the defendant admits his liability, rather than go on in the doubtful chance of his recovering more by an expensive litigation. To extend the act to such cases, would be opening a new and very wide door for litigation and discussion, and would lead in the end to the dangerous practice of trying the merits of every case upon affidavits.

BAYLEY, J.—It has now been expressly decided in the Court of Common Pleas (*c*), that the statute does not apply

(*a*) 13 East, 90. (*b*) See *Laidlaw* v. *Cockburn*, 2 New Rep. 76.
(*c*) *Butler* v. *Brown*, 3 J. B. Moore, 327.

to cases like the present; and it is very desirable to assimilate the practice of the two Courts as much as possible, especially where the reason and propriety of the decision are so apparent as they are here.

HOLROYD, J.—The act of taking the money out of Court by the plaintiff, is by no means conclusive to shew that there was no ground for arresting the defendant for a larger sum, or that the plaintiff's conduct was vexatious. The plaintiff may have elected to take the money out of Court rather than go on with the action, although satisfied that he was entitled to something more: and the case of *Linthwaite* v. *Billings* (a) is in point. It is now settled in both Courts, that the statute does not apply to a case like this, and I should much regret to see so wholesome a rule unsettled.

Rule refused. (b)

(a) 2 Smith's Rep. 667. See 1 Id. 428. Hullock's Costs, 136. 2 Marsh. 530.

(b) See *Porter* v. *Pittman*, ante, vol. ii. 266. where this point was expressly decided; and *Camack* v. *Gregory*, 10 East, 525.

JOSEPH RAPHAEL RAVENGA *v.* JAMES MACKINTOSH.

Friday, May 7.

Where *A.* arrested *B.* upon the advice of his special pleader that he had a good cause of action, but afterwards, upon being ruled to declare, discontinued proceedings, and B. brought an action for a malicious arrest without any reasonable or probable cause: Held, that the "reasonableness, or probability of the cause," was a mixed question of law and fact for the jury to decide; and that they were rightly told by the Judge at Nisi Prius, that if they believed the defendant to have acted bonâ fide upon the advice he had received, he was entitled to a verdict; otherwise they ought to find for the plaintiff.

CASE for a malicious arrest and false imprisonment, without any reasonable or probable cause.—Plea, Not guilty. At the trial before *Abbott*, C. J. at the *London* Adjourned Sittings after last Term, the case was to the following effect:—The plaintiff was Minister of State and the Foreign Department, for the *Columbian* republic in *South America*, which government had not been acknowledged, at the time of the transaction in question, by *Great Britain*. In Oc-

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tober, 1820, a M. *Luis Lopez Mendez* resided in *London* in the character of Ministerial Commissioner and Agent of *Columbia*. The government of *Columbia* being in want of considerable supplies of warlike stores, *Mendez* received from the plaintiff, in his official character, instructions to procure in this country the necessary articles. Accordingly *Mendez* applied to the defendant, who supplied warlike stores for the use of the government to the amount of 150,000*l.* which were shipped for *Columbia* under the care of a supercargo, appointed by *Mendez*. The latter proposed to pay the defendant by government debentures, which he conceived he had authority to issue in consequence of the powers with which he was invested by the members of the *Columbian* administration. At this time, however, a Mr. *Zea* was in *England*, armed, as it was supposed, with powers to negociate a loan on behalf of the government. Mr. *Zea* objected to the issuing of debentures by *Mendez*, alleging, that if there were two kinds of debentures in the money market, one sort issued by him, the other by *Mendez*, they would tend to impair the credit of the government. In consequence of this objection, the plaintiff, *Zea, Mendez*, and the defendant, met at *Paris*, upon the subject of the mode in which the latter was to be paid. Mr. *Zea* and the plaintiff both objected to the issuing of the debentures by *Mendez*; and it was further objected by the plaintiff, that the prices at which the defendant's goods were charged, were too high. The plaintiff returned to *South America*, and *Mendez* in the meantime issued debentures to the defendant, on an understanding that they were to be indorsed by *Zea*; but in the result, the government of *Columbia* refused to pay them, on the alleged ground that *Mendez* had no authority to enter into the contract with the defendant, and that the goods had been charged at prices exceeding their value. In the beginning of 1823 the plaintiff arrived in this country, having been appointed Minister Plenipotentiary for the *Columbian* government. On his arrival, the defendant applied to him to ratify the contract

which had been made by *Mendez*, and to sanction the debentures which the latter had issued. The plaintiff said he had no authority to ratify any such contract, nor power to sanction the debentures. The defendant then consulted his professional adviser as to the plaintiff's personal liability: a statement of the facts, together with all the documents relating to the transaction, was laid before a special pleader, who gave it as his distinct opinion, that the plaintiff was personally liable, and might be held to bail for the amount of the defendant's contract. Whereupon the defendant caused the plaintiff to be arrested on the 20th *March* upon an affidavit of debt, sworn to by the defendant, for the sum of 90,000*l*. He was carried to a lock-up-house, and thence to the King's Bench prison, where he remained until the 17th *May*, when he gave bail. The defendant took no farther proceedings until the *Michaelmas* Term following, when the plaintiff ruled him to declare; and at the end of that term he declared accordingly in an action for goods sold and delivered; but in four or five days afterwards took out a rule to discontinue the action. Under these circumstances, the present action was brought. The Lord Chief Justice, in his charge to the jury, told them, that this action was not maintainable unless they were satisfied that the defendant had arrested the plaintiff maliciously, and without any reasonable or probable cause. His Lordship said, that if the defendant had proceeded in his action against the plaintiff, he certainly could not have recovered. He also adverted to the circumstance of the defendant having taken the opinion of a special pleader before he arrested the plaintiff; and in conclusion said, "If you are of opinion that the defendant acted bonâ fide upon the opinion of his special pleader, sincerely thinking and believing that he might succeed in the action for goods sold and delivered, you ought to find your verdict for the defendant; but if, on the other hand, you think that the defendant did not act bonâ fide on that opinion, but was satisfied in his own mind that he had no ground to suppose

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he should succeed in the action against the plaintiff, and adopted the proceeding by arrest, not for the purpose of enforcing payment of a sum of money claimed to be due, but to induce him to do some collateral act, which he was not bound to do, then I think you ought to find your verdict for the plaintiff." The jury found their verdict for the plaintiff—damages 250*l.*

Copley, A. G. now moved for a rule to shew cause why the verdict should not be set aside and a new trial granted, on the ground of misdirection. In order to maintain an action of this description two things are essentially necessary; first, malice, and second, want of probable cause. Either of these is not sufficient, both must concur. Malice is a question of fact for the jury; want of probable cause, for the Judge, to decide. [*Bayley*, J. May not the want of probable cause be a mixed question of law and fact for the jury to decide?] Only where there happens to be any doubt as to the facts; but the moment the facts are ascertained, the question of want of probable cause is for the decision of the Court. In *Bull. N. P.* 14. it is said, that "If the plaintiff do prove malice, yet if the defendant shew a probable cause he shall have a verdict, and the Judge, not the jury, is to determine whether he had a probable cause." This distinction is also clearly expressed by Lord *Mansfield* and Lord *Loughborough* in *Johnson* v. *Sutton* in error (*a*), where they say, "The question of probable cause is a mixed proposition of law and fact. Whether the circumstances, alleged to shew it probable or not probable, are true and existed, is a matter of fact; but whether, supposing them true, (and of course the proposition holds good when the circumstances are proved to be true,) they amount to a probable cause, is a question of law." It is clear, therefore, from these authorities, that where the facts are established so as to raise the question of probable cause, that question is to be decided by the Judge and not by the

(*a*) 1 T. R. 545.

jury. Now here, admitting that the defendant had such an indirect motive for arresting the plaintiff as might be construed into malice, still there was another ingredient wanting to the maintenance of the action, namely, the absence of probable cause. Conceding that the defendant's object in arresting the plaintiff was to induce him to sanction the debentures which had been issued by *Mendez*, still, as the defendant had acted upon the advice and opinion of his special pleader, he had, in point of law, a reasonable and probable cause for that proceeding. Now that question was not decided by the Judge, as it ought to have been, but was left to the jury, and on that ground the defendant is entitled to a new trial. [*Abbott*, C. J. It is quite clear that the defendant was misadvised in point of law. The plaintiff was never legally liable to him, because he was not in any manner a party to the original contract. But the question is, by what motive the defendant was actuated when he obtained legal advice and under what circumstances he acted upon it.] If he has been misadvised in point of law, no responsibility attaches upon him; he is no lawyer; he obtains the advice of one who is a lawyer; he acts upon that advice; and he ought not to be made answerable for the consequences. [*Bayley*, J. But did he act bonâ fide upon the advice he received? That was a question of fact, and properly left to the jury as such; they were of opinion that he did not, and how can we say that he did? *Abbott*, C. J. I have very great doubts whether the defendant really believed that the advice he received was good in point of law. I left that question to the jury, and I left it to them to say, whether the defendant had acted bonâ fide upon the opinion of his professional adviser. I told them, that if they thought he had acted upon that opinion, believing it to be law, and believing that he had a fair legal claim on the plaintiff, then they ought to find their verdict for the defendant; but that if they were satisfied that he knew he had no real cause of action, and had arrested the plaintiff for the purpose and as a means of inducing him to do some other act, then they were bound to find their

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verdict for the plaintiff. The jury, thus directed, found for the plaintiff, and I cannot say that they did wrong. I am quite satisfied, that under the circumstances of the case, the question of probable cause, was matter of fact for them, and not of law for me, to decide; and it seems to me, that in so leaving the case to the jury, I pursued the most favourable course possible for the defendant.] There was no evidence at the trial tending to shew that the defendant did not believe the advice he received to be sound and honest advice, or that he doubted his right of action, or in any respect acted malâ fide; upon that point, therefore, there was nothing to leave to the jury, and they should have been directed to find for the defendant.

ABBOTT, C. J.—I confess I think there was evidence to that effect, and it is plain that the jury thought so too. An attempt was made to induce the plaintiff to pay the money through the influence of a threat, because he was told in a letter, written by the defendant's attorney, that he was liable to be arrested. No attorney should have used such language upon such an occasion. It was evidently a contrivance between the defendant and his attorney to frighten the plaintiff into signing the debentures. I think the case went to the jury in a shape most favourable for the defendant, and I, for one, am perfectly satisfied with the mode in which they have disposed of it. If it is said that want of probable cause is a question of law, and that I was bound to give my opinion upon it, I must have given it against the defendant; for I am of opinion, that there was no probable cause, inasmuch as the defendant had no right of action whatever against the plaintiff. Malice and want of probable cause is a compound proposition. I directed the attention of the jury to the conduct of the defendant after the plaintiff was arrested. The plaintiff, after being in prison nearly two months, was allowed to be discharged on bail just on the eve of the time when the defendant ought to have declared against him. The defendant did not declare

until after he had been ruled so to do peremptorily, and then, in four or five days afterwards, he took out a rule to discontinue; and I left the jury to say, whether this was not evidence to satisfy them that the defendant was convinced in his own mind, that if he had gone on with his action he must have failed. I thought at the trial, that I left the case to the jury in the most favourable way to the defendant, and I confess I think so still.

BAYLEY, J.—I entertain no doubt whatever that there was a want of probable cause for this arrest. I accede to this proposition, that if a party lays his facts fairly before counsel, and he acts bonâ fide upon the opinion he receives, however erroneous the opinion may be, he is not liable for the consequences. But the sincerity of his conduct is a question for the jury, and that question was left for the consideration of the jury who tried this cause. In my opinion, there was abundant evidence for the jury to draw the conclusion that the defendant did not act bonâ fide. It may happen that a party takes half-a-dozen opinions upon his case, three of which are on one side, and three on the other. He may be perfectly safe in acting upon three, but not upon the others. Still, however, it is a question for the jury to draw the conclusion, whether he has or has not acted bonâ fide. I think this case was properly left to the jury, and that they have disposed of it rightly.

HOLROYD, J.—I am also of opinion, that this case was most correctly left to the jury. The question might certainly have been very different if, notwithstanding there was a malicious motive, the defendant had acted upon a belief that the opinion which he had received from his adviser was correct in point of law. Had that been the case here, it might have presented a very different question from that which is now before the Court. The question left for the jury was, whether the defendant acted bonâ fide in a conscientious belief that he was entitled to recover; and I

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think there was quite enough for the jury to draw the conclusion, that the defendant did not believe that he had any remedy against the plaintiff, but that he resorted to the expedient of arresting him, in the expectation that he would come to some terms of compromise. I am of opinion, that the case was correctly left to the jury, and that there is nothing to impeach the verdict.

LITTLEDALE, J. concurred.

Rule refused.

Friday, May 7.

THWAITES, Gent. one, &c. v. PIPER.

Where an attorney arrested the defendant, and held him to bail, for his bill of costs, amounting to 15*l.*, and the costs were afterwards reduced by taxation to a sum less than 15*l.*, the Court refused to order the bail-bond to be delivered up to be cancelled.

ARCHBOLD moved for a rule to shew cause why, upon filing common bail, the bail-bond given by the defendant in this case, should not be given up to be cancelled. The plaintiff, an attorney, had arrested and held the defendant to bail for his bill of costs, amounting to 15*l.*, at the expiration of a month. After he was arrested and gave a bail-bond, the defendent caused the bill to be taxed, and it was reduced to a sum less than that amount; and now this application was made on the 51 *Geo.* 3. c. 124. [*Abbott*, C. J.—Suppose a man is arrested for 20*l.* and the jury find him indebted for a sum for which he would not be liable to be arrested; is there any instance in which the Court has said, under such circumstances, that the bail are discharged?] There is not; but this case is distinguishable from that, because here the plaintiff is an attorney, and he knows very well what items in his bill will or will not be allowed on taxation. He knows beforehand that if he makes an overcharge the officer of the Court will deduct it on taxation, and therefore if he arrests a party upon a bill which is compounded of items, which upon taxation will reduce his demand below 15*l.*, he must be assumed to act under motives which the court will not sanction. This is not like the case of goods sold and de-

livered, where a jury of tradesmen may reduce a plaintiff's demand to what they may consider just and reasonable, although in the first instance the defendant was liable to be arrested for a much larger amount. This plaintiff must be taken to know that he had no right to arrest the defendant for 15*l*., and therefore the present application is justifiable.

HOLROYD, J.—By the 30 *Geo.* 2. c. 19. s. 75. an attorney's bill must be delivered one month before he can proceed to recover it by action. If the defendant within that time gets it taxed, then it may be presumed that the charges are objected to; but if he thinks proper to lie by for the whole month, and wait until the action is commenced, and induces the plaintiff to suppose that there is no objection to the amount of the bill, then the case would stand precisely on the same principle as if the amount was ascertained by the verdict of a jury. The circumstance of the bill being afterwards taxed can make no difference as to the liability of the bail. It appears to me that this application cannot be supported.

The other Judges concurred.

Rule refused.

BOLTON *v.* CROWTHER.

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Where trustees under the general Turnpike Act, by improving the course of a public road, had effected a consequential injury to a private individual whose estate abutted on the road: Held, that they were not liable to an action, it appearing that they had not exceeded the authority given them by the statute.

CASE for a nuisance to plaintiff's land, by lowering the high road in one part, and raising it in another, whereby three of plaintiff's gates leading from the highway to his land were rendered impassable and useless, the land was deteriorated in value, and plaintiff was obstructed in the enjoyment of it. Plea, not guilty, and issue thereon. At the trial before *Park*, J., at the last *Staffordshire* Assizes, the

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case was this. The plaintiff was the owner of an estate in the county of *Stafford*, a considerable portion of which abutted upon the *Weddensbury* turnpike road. The defendant was clerk to the trustees of the turnpike road. Within three months before the action was commenced, the trustees had effected an alteration and improvement in the portion of road in question, by lowering one part of it, and raising another very considerably, so much so, that three out of six gates leading out of the road by different directions, through the plaintiff's grounds to his house, were rendered perfectly useless, one of them being now left too far below, and the others too far above the level of the road, to make any communication between them possible, at least without very great difficulty and expense; and for this injury the action was brought against the defendant, as clerk to the trustees, pursuant to the directions of the statute 3 *Geo.* 4. c. 126. It was contended for the defendant, that the action was not maintainable, inasmuch as by the terms of the act the trustees were bound to make the improvement in question, and therefore were not liable to make compensation for any damage which might be consequent upon it; and the learned Judge being of that opinion, directed the jury accordingly, and they found a verdict for the defendant.

Jervis now moved for a new trial, on the ground of misdirection. The learned Judge told the jury, that, according to the true construction of the last General Turnpike Act (a), the trustees of the road, and the defendant as their clerk and agent, were bound by law to effect the alteration and improvement, in the execution of which the alleged injury was done to the plaintiff's land, and therefore were not liable, in any form of action, for the consequences of their acts, unless they had acted arbitrarily, oppressively, or negligently in the management of the work. Now upon examining the 83d section of the statute, it will appear that this is not the construction which ought to be put upon it. That

(a) 3 *Geo.* 4. c. 126.

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section enacts, "That it shall be *lawful* for the trustees, and they are hereby fully *authorised and empowered*, from time to time, to make, direct, shorten, vary, alter and improve the course or path of any of the several and respective roads under their care and management, or of any part or parts thereof," &c. This language plainly indicates that the statute was intended to be permissive only, not obligatory, and therefore if in the exercise of the powers vested in him the defendant has worked an injury to the plaintiff, he is liable to make compensation. It is true that the act does not in terms provide for compensation to parties damnified by the conduct of the trustees; but still the general principle of law, sic utere tuo ut alieno non lædas, extends to this case, and renders the defendant answerable. It was held in *Roberts* v. *Read*(*a*), that "although the general Highway Act, 13 *Geo.* 3. c. 78. s. 81., directs that actions against any persons for any thing done or acted in pursuance thereof shall be commenced within three calendar months after the fact committed, and not afterwards; yet if surveyors of highways, in the execution of their office, undermine a wall adjoining to the highway, which does not fall till more than three months afterwards, they are subject to an action on the case for the consequential injury within three months after the falling of the wall." That case, though decided upon a different point, nevertheless proceeds upon the principle now contended for, and indeed seems to carry it even farther than is necessary for the maintenance of the present action. At the trial, *Sutton* v. *Clarke*(*b*) was cited and relied upon as governing the present case, but this is very distinguishable from that case. [*Holroyd*, J.—Have we not very recently decided that words of permission in a statute, to do an act which is for the public benefit, are obligatory(*c*); and does not this case clearly range within the operation of that rule?] That decision applied to the charter of a corpo-

(*a*) 16 East, 215. (*b*) 6 Taunt. 29. 1 Marsh. 429. S. C.
(*c*) *R.* v. *The Mayor of Hastings*, ante, vol. i. 148. See *R.* v. *The Bailiffs of Eye*, ante, vol. ii. 171; and *R.* v. *The Steward of Havering at the Bower*, id. 176.

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ration, and cannot be extended so as to comprehend this case. However, upon the authority of *Leader* v. *Moxton*(a), the rule now prayed for must be granted, for that case established the principle, that the commissioners, under such an act as the present, are liable to make good to individuals any actual damage sustained by their acts. [*Abbott*, C. J.— The authority of that case was very much doubted in *The Plate Glass Company* v. *Meredith*. (b)

ABBOTT, C. J.—I think the case went to the jury in the most favourable way in which it could be put for the plaintiff, and was most correctly left, in point of law, by the learned Judge. The action is brought against the clerk to the trustees of a turnpike road, for an act done by them, which has turned out in some respects to be injurious to the plaintiff. The case presents two questions; first, whether the act done by the trustees was one which, by the general Turnpike Act, they were authorised to do, or not. If it was one which they were not authorised to do, undoubtedly they were liable to an action for the consequences of what they had done. But if it was an act which they were authorised in doing, then, that raises the second question, whether, in point of law, an action can be maintained against persons who, in the execution of a public trust, are bound to do an act which may work some special injury to a particular individual. The first point is, whether the act is one which the trustees had authority to do. That will depend upon the powers given them by the statute 3 *Geo* 4. c. 126. s. 83., by which it is enacted, " That it shall be lawful for the trustees, and they are hereby fully authorised and empowered, from time to time, to make, direct, shorten, vary, alter and improve the course or path of any of the several and respective roads under their care and management, or any part or parts thereof." Before this act of parliament was passed, the lowering and levelling of hills had become one of the most common and ordinary modes of improving the

(a) 3 Wils. 461. 2 Sir W. Bl. 924. S. C. (b) 4 T. R. 794.

course of a public road. I must, therefore, understand, that when the legislature gave the trustees, in general words, the power of "improving the course or path of any of the several roads under their care and management," they meant to give them the power of doing so in the usual and ordinary mode; and in my judgment this act of parliament has the same effect as if it had enumerated and specified certain hills, describing them by their names and situations, and had given authority, in terms, to the trustees of the road to lower them. I am, therefore, clearly of opinion that the act done, which was that of lowering a hill upon a public road, was an act which the trustees were authorised to do, under the terms, "alter and improve the course or path" of this road. The act done being one which they were authorised to do, then, the second question is, whether, by law, an individual, who has sustained some special injury from the act so done, can maintain an action at common law against them. That it cannot has been expressly held by Lord *Kenyon*, in *The Plate Glass Company* v. *Meredith*. The language of that learned Judge is very strong, and is also very general, not being confined to the special provisions of the act of parliament then under consideration. He says, "If this action could be maintained, every turnpike act, paving act, and navigation act, would give rise to an infinity of actions. If the legislature think it necessary, as they do in many cases, they enable the commissioners to award satisfaction to the individuals who happen to suffer. But if there be no such power the parties are without remedy, provided the commissioners do not exceed their jurisdiction. But it does not seem to me that the commissioners acting under this act have been guilty of any excess of jurisdiction. Some individuals suffer an inconvenience under all these acts of parliament, but the interests of individuals must give way to the accommodation of the public;" and *Buller*, J. says, "There are many cases in which individuals sustain an injury for which the law gives no action; for instance, pulling down houses or raising bulwarks for the preservation and

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defence of the kingdom against the King's enemies. The civil law writers, indeed, say, that the individuals who suffer have a right to resort to the public for a satisfaction; but no one ever thought that the common law gave an action against the individual who pulled down the house, &c. This is one of those cases to which the maxim applies 'salus populi suprema est lex.' If the thing complained of were lawful at the time, no action can be sustained against the party doing the act." That is the opinion of these two learned Judges; and it seems to me that that case is a decisive authority upon the second point. Here the trustees have done an act which they were authorised to do by law, and it being found by the jury that in doing it they did not conduct themselves arbitrarily, oppressively, or carelessly, I am of opinion that the law provides no means of giving satisfaction to this plaintiff.

BAYLEY, J.—I am of the same opinion; and I think it would be most fitting, if any doubt should be entertained of the liability of persons in the situation of this defendant, that such doubt should be set at rest. In addition to the case of *The Plate Glass Company* v. *Meredith*, it is laid down most distinctly by *Gibbs*, C. J., in *Sutton* v. *Clarke*, that when a person stands in the situation in which this defendant stood, having a public trust to perform, and a public duty cast upon him by act of parliament, he is not to be liable for any consequential injury which may result from his conduct, provided he acts not arbitrarily, nor wantonly, but in the sound exercise of his discretion; and I agree entirely with my Brother *Park*, in that part of his direction in which he told the jury that the trustees were bound by law to do what they did in this instance. If, upon surveying a road, the trustees find that a material benefit will result to the public from lowering a hill and filling up a valley, and that it cannot be done without injury to private individuals, I think, in the sound exercise of their discretion, it is their bounden duty to do what is necessary for the public benefit.

From the manner in which this case was presented to our notice, I thought it was one of the most important ever brought under the consideration of the Court, and that the plaintiff had to complain of a most grievous injury. It appears, however, that the only injury which the plaintiff has sustained, is that three out of six accesses to his house have become useless. It is conceded that the trustees had a right, in the exercise of their discretion, to remove all obstructions to the public road. If so, and they have not acted arbitrarily or wantonly, then it is perfectly clear that no action is maintainable. The case of *Leader* v. *Moxton* seems to be quite consistent with the decisions in *Sutton* v. *Clarke*, and *The Plate Glass Company* v. *Meredith*, because in that case, according to the report in Sir *William Blackstone*, the decision of the Court proceeded on the ground that the commissioners had grossly exceeded their authority by an unnecessary act, whereby the greatest possible inconvenience was experienced by private individuals. In this instance it does not appear to me that these trustees have exceeded their power. It was left as a question to the jury, whether they had acted arbitrarily, wantonly, or improperly. The jury were of opinion that they had not, and that being the case, and considering that these trustees had a public duty to perform, I am of opinion that they are not liable to an action.

HOLROYD, J.—It is a general rule of law, that where a public officer is acting in the discharge of his duties, no action will lie against him for the consequences of his acts, unless he either exceeds or abuses his authority; and that is a sound rule, because to punish a man for a result produced by his performance of a duty imposed upon him by law, would be equally absurd and unjust. The defendant in this case has been guilty of no excess or abuse of his authority, but has acted properly and bonâ fide in the discharge of his duty, and on that short ground I am clearly of opinion that this action will not lie against him.

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Littledale, J.—This action is not maintainable. I agree in the maxim "sic utere tuo ut alieno non lædas;" but it does not apply to this case, because the defendant merely acted in discharge of a duty imposed upon him by the act of parliament. That act was past for the benefit of the public, not of the trustees, and as it does not provide for any compensation to those who may be damnified by its operation, the trustees are not liable to make any. It does not appear that the defendants entered upon the plaintiff's land in the progress of the work, though I am of opinion that they would not have been liable as trespassers even if they had done so. To the cases already cited, and which are quite decisive of the present, *Jones* v. *Bird*(a) may be added, as supporting the same principle, because there it was held that the plaintiff might recover only upon the ground that the defendants had been guilty of negligence.

Rule refused.

(a) Ante, vol. i. 497.

Hancock v. Southall.

Saturday, May 8.

Declaration for striking plaintiff's cow divers blows, whereof the animal died. Proof, that defendant had beaten the cow unmercifully, and that plaintiff, to shorten the animal's miseries, put it to death: Held, after verdict, no variance.

THIS was an action against the defendant for killing a certain cow of the plaintiff. The declaration stated that the defendant struck the plaintiff's cow divers blows, by reason whereof she died. At the last *Herefordshire* Assizes, before *Park*, J., it appeared that the defendant, having beaten the plaintiff's cow unmercifully, the plaintiff, in order to put an end to the animal's sufferings, put it to death. It was objected for the defendant that this was a variance, for non constat that the animal died of the blows given by the defendant. The objection was overruled, and the plaintiff had a verdict.

Twiss now moved to enter a nonsuit, and renewed the objection; but

PER CURIAM. This objection is cured by the verdict. No doubt the jury thought that the beating which the animal received, made her death necessary, and that it was an act of mercy to shorten her sufferings by death.

Rule refused.

CAMBRIDGE *v.* ANDERTON.

Saturday, May 8.

Where a vessel was so damaged by a sea peril, that in order to render her seaworthy it would cost as much to repair her as she was originally worth, and the captain sold her to a purchaser who partially repaired her, and sent her upon a voyage which she never completed in consequence of her infirmity: Held, first, that the underwriters were liable as for a total loss, though the vessel remained in specie at the time she was sold; and second, that notice of abandonment was unnecessary to entitle the owner to recover.

ASSUMPSIT on a policy of insurance for 3000*l.* on the ship *Commerce*, at and from *Quebec* to *Bristol*, or the ship's port in *Great Britain*. Loss averred to be by perils of the seas. Plea, non assumpsit, and isue thereon. At the trial before *Abbott*, C. J. at the *London* Adjourned Sittings after last term, it appeared in evidence that the *Commerce*, of the burthen of 372 tons, having taken in a full cargo of timber, sailed from *Quebec* on the 8th *July*, 1823, in good order, and with a sufficient crew, and proceeded down the river *St. Lawrence*, destined for the port of *Bristol*. On the 10th *July* the pilot quitted the ship off the Isle of *Bie*, about 100 miles below *Quebec*, where pilots are usually discharged. On the 12th she was off a place called the *Paps of Matan*, which are high hills, about twenty miles from the shore on the south side of the mouth of the river *St. Lawrence*, and about two hundred miles from *Quebec*, where the sea is as boisterous as in the ocean. A thick fog came on, with the wind from the eastward, blowing a fresh gale, and a considerable sea was running. The ship took in sail, and continued tacking under easy sail, the wind being from the E. to E. N. E. until the next day. On the 13th, about half-past eight o'clock A. M. she struck, about five miles on the westward or *Quebec* side of *Matan*, not a quarter of a mile from the shore, which was invisible from the thickness of the fog. The force of the first shock was so great, that the rudder was unshipped, the lower part of the rudder case torn

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out, the pintles bent, and both pumps hove up, one sixteen, and the other eighteen inches, from their proper places. The vessel went on her larboard side, and took the ground when the tide began to ebb. Every exertion was made by the crew to keep her free, in the hope that she might be got off when the weather moderated. At low water, the gale increasing, the sea beat over her and made her rock like a cradle. She began to fill with water, and the crew were obliged to take to their boats for the preservation of their lives. The captain went in his boat in search of assistance, but, from the desolate situation of the place, was unable to procure any. On the morning of the 15th, the weather being moderate, the captain went on board, and found that the keel had gone fore and aft, and pieces of it were washed on shore, the stem and gripe were gone, and the ship was bilged, hogged, and twisted in such a manner, that he considered it impossible to make her seaworthy. After ordering the mate to unbend all the light sails, he went to *Matan*, a village of about six houses, occupied by some pilots and fishermen, to try if he could procure assistance; but all the help he could obtain was a schooner of about fifteen tons burthen, with a crew of three or four hands; but judging it imprudent to haul the ship off the rocks, if it were practicable, with such means, and apprehending that if it came on to blow hard, the ship would, in the position she lay, be beaten to pieces, he determined, after having removed the spare sails and stores into the schooner, to return himself to *Quebec*, and advise with the merchants to whom he was addressed what was best to be done under all the circumstances. On the 24th he arrived with great difficulty in an open boat at *Quebec*, and after a consultation with the merchants to whom he was addressed, and the resident agent of *Lloyd's*, it was deemed expedient to call a survey, and sell the vessel to the best advantage. Three experienced persons were then appointed to make a survey, and accordingly they went down to the vessel, and after a careful examina-

tion they gave it as their opinion, that the expense of getting her off the place where she then was, if it could be accomplished, and repairing her, would far exceed her value when repaired; and taking all the circumstances into consideration, and from every appearance of the vessel, they judged that for the benefit of all parties concerned, she should be publicly advertised for sale at *Quebec*, and sold at the place where she then lay. Accordingly she was advertised and sold by public auction on the 4th *August* to a ship builder at *Quebec*, who purchased the hull, tackle, stores, &c. at the price of about 1000*l.* including the ship's register. The purchaser got her off the rocks, and she was towed in about seven weeks to *Quebec* by a schooner part of the way, and the remainder by a steam vessel. He then put her into a state of repair, the expense of which amounted to about 1,000*l.* Thirty men were employed night and day upon her for about three weeks, at the end of which time she was got off the stocks, and took in a cargo of timber for *Great Britain*. In *November* she put to sea, but when she got into the Gulph of *St. Lawrence* she became leaky, and drove on shore on *Prince Edward's* Island, where she was totally lost, and several of her crew were drowned. It appeared that several of the crew who had been hired by the purchaser refused to sail in her, and those who went, had been hired at extraordinary high wages. The captain and the mate both deposed that when the vessel was repaired as above-mentioned, they would not have trusted their lives in her. One of the seamen hired upon the voyage, said he was obliged to leave her after she had put to sea in consequence of her leaky state. At the time he left her, she was full of water. It was proved that it would have cost 3,000*l.* to render the vessel seaworthy, exclusive of the expense of getting her off the rocks, &c. The present action was brought for a total loss, giving the underwriters credit for the amount at which the vessel was sold. The plaintiff had neglected to abandon to the underwriters. It was contended on the part of the defendant, first,

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that this was not a total, but an average loss, with benefit of salvage, because the ship remained in specie and could not therefore be said to be totally lost; and second, that at all events a notice of abandonment was necessary in order to support an action for a total loss. The Lord Chief Justice told the jury, that if they thought the vessel could not be repaired without an expense fully equal to her value when repaired, he was of opinion, in point of law, that it was a total and not an average loss, and that notice of abandonment was not necessary to enable the plaintiff to recover. The jury found for the plaintiff for the full amount claimed.

Copley, A. G. now moved for a new trial on the ground of misdirection in point of law. It is impossible to say that a ship, which remains in specie after the accident which she meets with, is totally lost. The ground on which this was held to be a total loss was, that it was proved that it would have cost more to repair the ship than she was previously worth; but that is not the proper criterion for distinguishing between a total and an average loss: the only true criterion is, whether the ship does or does not remain a ship, in specie as such, after the accident, which it is clear this vessel did, because she was sold with her register, repaired for 1,000*l.* and sent to sea. Besides, there was no abandonment of the ship to the underwriters, which is an indispensible preliminary to an action for a total loss. This has been so held in several cases. In *Selwyn*'s N. P. it is said (*a*), "If the assured does not in fact abandon, or if he omits to give the underwriter notice of his having abandoned, he will not be entitled to claim as for a total loss." In *Hodgson* v. *Blakiston* (*b*), it was held, that notice of abandonment is necessary, although the ship and cargo have been sold and converted into money, when the notice of the loss was received. In *Martin* v. *Crockatt* (*c*), it was held, that where the ship was damaged, if the owner do not abandon,

(*a*) Sel. N. P. 866. 3d ed.
(*b*) Marsh. Ins. 611. last ed.
(*c*) 14 East, 465.

but merely applies to the underwriters for directions how to proceed upon an estimate of the expenses of repair, who decline interfering, he cannot afterwards convert it into a total loss, on account of the expenses of the salvage being found in the result to have exceeded the value of the ship, which was ultimately sold. In *Bell* v. *Nixon* (a), where a vessel was driven into a port in which there was no dock to receive her, and it appeared that she had suffered so much by perils of the sea, that, upon examination and survey, it was judged expedient to break her up and sell her for old timber, it was held, that the assured was bound to abandon before he could call upon the underwriters for a total loss, the ship not being a *wreck*, but, however damaged, existing in *specie* as a ship. [*Bayley*, J.—The Common Pleas have decided in *Read* v. *Bonham* (b), that where the damage done to a vessel is so considerable, that the expense of repairing her would far exceed her original value, and the captain having sold her bonâ fide for the benefit of all concerned, a new trial was refused, which had been moved on the ground that the ship ought not to have been sold, and that notice of abandonment had not been given in due time.] In that case, *Richardson*, J. differed from the other judges, and the propriety of that decision has since been very generally doubted: besides, in a subsequent case, upon the same point, that Court came to an opposite determination. *Meaburn* v. *Leckie* (c). [*Bayley*, J.—My brother *Rich-*

(a) Holt's N. P. C. 423.
(b) 6 J. B. Moore, 397.
(c) The case of *Meaburn* v. *Leckie*, was tried before *Dallas*, C. J. and a special jury, at *Guildhall*, on the 5th *March*, 1822, and was to the following effect:—It was an action on a Policy of Insurance on the ship *Lady Banks*, from *London* to the *East Indies*, and back again to a port in the *United Kingdom*. She sailed from *London* and arrived at *Calcutta* in *August*, 1820, where she took in a cargo and sailed for *Madras Roads*. After discharging part of her cargo in *Madras Roads*, she sailed from thence on the 19th *January*, 1821, and found it necessary to put into *Ceylon*, where she was repaired. She sailed from *Ceylon* on the 7th *March*, and having encountered very bad weather, sprung a leak, and after being with great difficulty kept afloat, was run on a mud bank at *Port Louis*, in the *Isle of France*. The captain applied to Messrs. *Hames* and *Watson*, of *Port Louis*, and they recommended him to petition the Vice Admiralty Court to have her surveyed. A survey was held, by

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ardson did not differ upon the legal principle on which the case was decided. *Robertson* v. *Clarke* (*a*) is an authority to the same effect. But is not *Idle* v. *The Royal Exchange Assurance Company* (*b*) decisive, to shew that an abandonment was not necessary in this case. The legal principle decided by these cases is, that if a vessel is so damaged by the perils of the seas as to render her sale necessary, it is to be considered a total loss.] The questions now before the Court, both as to what constitutes a total loss, and as to the necessity of abandonment, are generally important, and deserve farther consideration and a more solemn decision than they have ever yet received. The reason of the thing

which the repairs were estimated at between 25,000 and 30,000 dollars, which was more than the vessel was worth. But the surveyors, after stating the particulars of the repairs required, added, "If these repairs are done to the *Lady Banks*, we are of opinion that she will be a sound good ship, wholly efficient and perfectly sea worthy." The captain abandoned her, and she was sold by order of the Vice Admiralty Court, to Messrs. *Saunders* and *Wiecke*, ship builders, at 3,200 paper dollars. When the captain left the *Isle of France*, she was under repair in the purchaser's dock. The captain had no means of raising money, and he said that if he had had money he would not have repaired, but sold her. The Lord Chief Justice in his charge to the jury, mentioned and commented on the cases of *Idle* v. *The Royal Exchange*, and *Read* v. *Bonham*, and after stating the facts, said, "I shall, therefore, leave it to the jury to say, whether there existed such a necessity as called upon the captain to sell the ship, and if there did, whether there was a fair sale unmixed with fraud. Tell me, first, if you think the captain meant to act with good faith, and for the benefit of all parties concerned, and with the best intentions. I request the favor of your opinion upon this point. You will consider the state of the ship, the estimate of the repairs, the cargo she had on board, and the means which the captain had of raising money to make the repairs required. You will consider the necessity of selling; whether it was necessary that the captain should sell the ship." The Jury having retired, and returned, and being asked if they agreed on their verdict,

The Foreman said, We proceed to give three answers to the questions propounded. First, we find that the captain appears to have acted according to the best of his judgment. Secondly, that the sale was conducted fairly and honestly. And, Thirdly, that there was no necessity for the sale of the ship.

DALLAS, C. J.—Then your verdict will be for the defendant. You are quite right.

Lens, Serj.—The verdict will be for the plaintiff, on the ground of an average loss. The amount will be settled out of Court.

Vaughan, Serj.—The finding of the Jury is for an average loss.

A verdict was entered for the plaintiff for an average loss.

(*a*) 1 Bing 445. S. C. 7 J. B. Moore.

(*b*) 3 J. B. Moore, 115.

proves that an abandonment is requisite, because as the owner has his election how he will proceed, whether for a total or an average loss, the underwriter cannot know what his situation is, until that election is made and a notice of abandonment given. [*Bayley*, J.—The Court of Common Pleas in *Read* v. *Bonham*, solemnly decided that an abandonment was not necessary.] The decision there can scarcely be considered as going that length; the question of abandonment was not the main point in the case; and there were besides other acts done by the owner equivalent to an abandonment. [*Abbott*, C. J.—Certainly, if the ship remains in specie, as a ship, and available for the purposes of a ship, she cannot be said to be totally lost; but if she is a mere congeries of planks, utterly useless without a repair which would cost more than her value, which was the case here, then she is totally lost, in every fair sense of the words.] She is sold as a ship with her register. [*Abbott*, C. J.—The name you give a thing will not alter the nature of it.]

Bayley, J.—It seems to me, that if the questions now propounded, are ever to be raised by a bill of exceptions, or other more solemn mode of proceeding, this is the most unfavourable case on the part of a defendant in which such questions could be raised; for upon the facts proved in evidence, the case admits fairly of no doubt whatever, if we are right as to the legal principle upon which it is to be decided. What is the case upon the evidence? By means of one of the perils against which the policy insures, the ship, which is the subject of insurance, ceases to retain the character of a ship, and is, properly speaking, a wreck, and consequently entitles the assured to recover as for a total loss. It is perfectly clear that the assured was at liberty to sell the ship in the state in which she was, and if he made a sale, he is entitled to recover from the insurers as for a total loss, without making any abandonment whatever. That was solemnly decided in the Court of Common Pleas, in

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Idle v. *The Royal Exchange Assurance*(a). But I do not rely upon that case so much, because there was afterwards a writ of error brought upon the judgment of the Common Pleas, which shews that some of the parties interested, were not satisfied with the decision. What ultimately became of that case, I have not the means of knowing (b), but I rely more upon the case of *Read* v. *Bonham* (c). Although my brother *Richardson* differed in opinion from the other Judges in the decision of that case, yet he did not differ from the general legal principle on which it was founded. He thought, indeed, that it was very questionable whether the facts were such as to justify the sale, and he was of opinion that the case ought to go to the consideration of another jury, as to whether the facts did justify a sale or not. But it does not appear that there was any doubt in his mind, if the sale was necessary, that the assured would have been entitled to recover as for a total loss. Now, in this case, was the sale justifiable or not? Upon the evidence of the captain, (whose testimony is not contradicted,) he considered her a wreck. The purchaser of the vessel was about seven weeks removing her to *Quebec*, a distance of only 220 miles. An expense of about 1,000*l.* is incurred in repairing her; but after she is repaired and after the expense was so incurred, was she properly entitled to the character of a ship? The captain said he would not trust his life in her; the mate gave testimony to the same effect; and a third man, who was hired to go on board her, as a mariner, at a higher rate of wages than ordinary, said, that without any extraor-

(a) 3 J. B. Moore, 115.

(b) 6 J. B. Moore, 397.

(c) Mr. *Moore*, in a note to his report of *Read* v. *Bonham*, states that *Bosanquet*, Serjeant, amicus curiæ, on the argument in that case, observed, that when *Idle* v. *The Royal Exchange* came on in the King's Bench, and he was about to argue for the plaintiffs in error, the Court called on the counsel for the defendant in error, to point out from the facts as found by the special verdict, that the sale was absolutely necessary; and on his stating that it must be inferred to be so from the finding of the Jury, a venire de novo was awarded for the purpose of ascertaining whether such necessity existed or not; and that the case had been since settled, without going to trial on the venire de novo.

dinary bad weather, she became unfit for the voyage before she left the gulph of *St. Lawrence*, and was so full of water, that he left her to avoid the imminent peril of his life. What does this evidence imply? why, that after an expense of 1,000*l.* incurred in repairing the ship, (she being valued at 3,000*l.*) she could not be made sea-worthy. Under these circumstances, I am of opinion that this was a case in which the sale of the ship was justifiable. All the witnesses agreed in this proposition, that a new ship might have been built at the expense which was necessary to make the vessel properly sea-worthy. Then this was clearly a total loss, because the vessel was originally insured as a ship, and at the time she was sold she ceased to have that character.

HOLROYD, J.—For the reasons so fully detailed by my brother *Bayley*, I am of opinion that the direction of my Lord Chief Justice was perfectly correct; that this was a total loss; that the sale was justifiable; and that no abandonment was necessary.

ABBOTT, C. J. concurred (*a*).

Rule refused (*b*).

(*a*) *Littledale*, J. was in the Bail Court.
(*b*) Vide *Green* v. *The Royal Exchange*, 6 Taunt. 68.

COOMBS and Another, Executors of M. BAKER, *v.* INGRAM.

Saturday, May 8.

Declaration on a promissory note, in general terms stating the promise by the defendant to pay the money sought to be recovered, is sufficient to sustain the action, though the note when produced shews it was given to pay the debt and costs of an action against a third person.

ASSUMPSIT on a promissory note. The declaration stated, that the defendant, on the 24th *July*, 1823, at *Dorchester*, made her certain promissory note in writing, and thereby, on demand, promised to pay the plaintiffs the sum of 400*l.* with lawful interest, and delivered the said note to

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plaintiffs, by means whereof, &c. she became liable to pay plaintiffs the said sum, &c. Money counts. Plea, Non assumpsit, and issue thereon. At the trial before *Burrough*, J. at the last assizes for *Dorchester*, the note given in evidence in support of the declaration, was in the following terms:

Charminster, 24th *July*, 1823.

COOMBS and BASCOMB, Executors, &c. *v.* OAKLEY, Clerk.

I promise to pay to Messrs. *Coombs* and *Bascombe*, executors, &c. on demand, 400*l.* together with lawful interest for the same, being the amount of the debt and costs in this action.

Ann Ingram.

It appeared, that the note was given by the defendant to satisfy an execution, taken out by the plaintiffs in an action against Mr. *Oakley*. On the part of the defendant it was objected, that there was a variance between the note proved and that declared upon, or at least that the note had not been sufficiently set out in the declaration. The learned Judge refused to nonsuit, but saved the point, with liberty to the defendant to move the Court. The plaintiffs had a verdict; and now

Coleridge moved for a rule nisi to enter a nonsuit. The question is, whether the note, which is the subject of the action, was sufficiently set out in the declaration, so as to enable the defendant to come sufficiently prepared for her defence. Strictly speaking, it cannot be contended that there was a variance, because the plaintiffs proved the whole of the allegation in the declaration, but they proved something more, namely, that which was calculated to mislead the defendant, and which, if it had been stated on the record, would have enabled her to come prepared with an adequate defence. The objection, therefore, is, that the plaintiffs have misdescribed the instrument upon which the action is brought. The declaration merely states, that the

defendant on such a day, at *Dorchester*, made her promissory note, without stating any date, and thereby promised to pay plaintiffs generally, 400*l.* on demand; but when the note is produced, it proves to be a very different instrument from that declared upon. Of the materiality of the misdescription there can be no doubt. By the note, the defendant in fact promises to pay the debt and costs in an action in which the plaintiffs, as executors, had sued and recovered judgment against a third person. Now, if the debt and costs had been paid by that person before action brought on the note, or if the judgment had been reversed, the action must have failed, and there would have been a good defence. But to the note as set out in the declaration, these facts form no defence, and therefore the defendant not only does not come prepared to prove them, but knowing that she has given no other note, pleads non assumpsit to the note set out in the declaration, and relies on the impossibility of plaintiffs proving such note. Again, the manner in which this note is declared on, in other respects, makes the misdescription more important. Neither the place of making, nor the time of making it, is set out; and according to the case of *Coxon* v. *Lyon* (*a*), the plaintiffs might have proved a note made at any time. That being so, if defendant has in fact given two notes, one to plaintiffs generally for their own demand, and one to them as executors, to discharge a specific claim, she would naturally come prepared to resist the one which is apparently the subject of action, because apparently set out in the declaration. Suppose that to the one she has the defence of the statute of limitations, but not to the other, she does not plead it; suppose the original defendant *Oakley* has in part satisfied the consideration of the one, and defendant has tendered the residue, she does not plead it. A number of such supposable cases might be put. But the misdescription is material in another respect, as abridging the defendant's modes of defence. As it is set out, the note is unquestionably within the au-

(*a*) 2 Campb. 307.

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thority of *Smith* v. *Kendal*(a), and many other cases, a good promissory note within the statute of *Anne*. But the note, as proved, is not so clearly within that statute, and the defendant might, if it had been truly set out, have been advised to demur to a count calling it a promissory note. Here is an instrument, not negotiable upon the face of it, promising to pay the debt of another, and expressing no consideration (b). The case of *Poplewell* v. *Wilson* (c) can hardly be considered as an authority; the point now objected did not come in question; and from reading the report, which is very short, it is probable that the words " or order," were in the note, because it is called a negotiable note. But if this note be a good one, it will be very easy to evade the decisions on the statute of frauds and the stamp acts, by drawing up every promise to pay the debt of another in the shape of a note which is not negotiable.

Abbott, C. J.—I think there is nothing in the objection. The general rule is, that the pleader must set out so much of the substance of the note as is necessary to presume a promise to pay. The whole note need not be set out.

Bayley, J.—The defendant would have been at liberty to impeach the note if it was given without consideration; but if it imports that it was given for consideration, the plaintiff is under no obligation to set out the consideration in the declaration. A promise to pay another such a sum of money is within the statute. Suppose a note is given for value received " in cochineal," is it necessary to state in the declaration that it is for value received " in cochineal?"—clearly not. If this was not the note which the defendant had given to the plaintiffs, she might easily have proved the fact at the trial; and that would have been a good defence.

Holroyd, J. concurred.

Rule refused (d).

(a) 6 T. R. 123.
(b) *Waine* v. *Warlters*, 5 East, 10.
(c) 1 Stra. 263.
(d) *Littledale*, J. was absent.

PARKER v. BAILEY.

Saturday, May 8.

Where a declaration for seducing plaintiff's daughter was framed in trespass, but omitted the words "with force and arms:"— Held, that the verdict cured the objection.

THIS was an action against the defendant for seducing the plaintiff's daughter, per quod, &c. At the trial before *Hullock*, B. at the last assizes for *Lincolnshire*, the plaintiff had a verdict, and 300*l.* damages.

Reader now moved to arrest the judgment, on the ground that the declaration appeared to be framed in case, instead of trespass (*a*), inasmuch as it omitted the words "with force and arms."

ABBOTT, C. J.—We are not called upon to decide whether trespass or case is the proper form of action for an injury of this description; it is sufficient for us to say, that this objection is cured by the verdict. Indeed, the words of the declaration, "debauched and carnally knew," import an assault. The whole language of the declaration is applicable to an action in trespass, though the words "with force and arms," are omitted. It is enough for the present to say, that the objection is cured by the verdict.

BAYLEY, J.—I am of the same opinion. It would be very singular if we were to arrest the judgment on the ground that the declaration is framed in case, and not in trespass, when all the circumstances stated in the declaration shew, that the action is in substance trespass, and not case.

HOLROYD, J.—There is a case in *Salkeld* (*b*) where the master of a ship brought case for seizing and detaining his vessel, whereby his voyage was obstructed, and it was objected that trespass was the proper form of action; but the

(*a*) *Woodward* v. *Walton*, 2 New Rep. 476.
(*b*) *Pitts* v. *Gaince*, Salk. 10.

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court held, that although trespass might have lain, yet that the plaintiff might waive the trespass and bring case for the special damage. It may be a question, whether case would not equally lie here, the special damage being the gist of the action. In the *Register*, and in *Townshend's* and *Cornwall's* Tables, this species of injury has always been treated as a trespass; but undoubtedly the action is founded upon the special interest which the father is supposed to have in his daughter as a servant. This was the principle upon which the case of *Bennett* v. *Allcott* (a) was decided. However, there is nothing stated in this declaration but what is properly applicable to an action of trespass. Treating it, however, as an action on the case, it might possibly be considered as coming within the principle of the case in *Salkeld*. Where goods are wrongfully seized, you may waive trespass and bring trover; either action will lie.

Littledale, J. was gone to chambers.

Rule refused. (b)

(a) 2 T. R. 167. (b) Vide 2 M. & S. 436. 6 East, 387, 388. 391. Wills. 332. 2 New Rep. 476.

Saturday, *May* 8.

EDWARDS *v.* TUCKER.

Where a defendant, upon his petition for relief under the insolvent act, had been adjudged to remain in custody for nine months, at the suit of his opposing creditor *A.* who was not an arresting or detaining creditor, and the Marshal discharged the defendant before the nine months were out:—Held, that he was liable to be arrested and held to bail at the suit of *A.* for the same debt.

OSBORNE moved for a rule to shew cause why the bail-bond given by the defendant, in this case, should not be delivered up to be cancelled, under the following circumstances:—The defendant having petitioned the Insolvent Debtor's Court for relief under the Insolvent Act, the plaintiff attended on the hearing of his petition, as an opposing creditor, for the debt in question. On that occasion the commissioners, after hearing the merits of the opposition, adjudged that the defendant should remain in custody for nine months, at the suit of the plaintiff; but the plaintiff

being neither an arresting nor detaining creditor, the Marshal discharged the defendant; whereupon the plaintiff, finding the defendant at large, arrested him, and he gave a bail-bond. The question was, whether, under these circumstances, the bail-bond ought to be delivered up to be cancelled, and

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The COURT said that it ought not. The defendant was ordered to be detained, at the suit of the plaintiff, for nine months, and therefore he was bound to remain in custody until that period had expired. Being at large before the nine months were out, he was liable to be arrested again.

Rule refused.

H. WILLIAMS, Gent. one, &c. *v.* J. R. GLENISTER.

Saturday, May 8.

To an action of assault and false imprisonment, a plea by a constable, that the plaintiff illegally, intentionally, and irreverently made a disturbance in church, whereby the performance of divine service was interrupted and disturbed; whereupon defendant gently laid hands upon him, took him out of church, and detained him in custody until the service was over; and it appearing in evidence that the alleged disturbance was in the plaintiff (an unauthorised person) having read aloud in church, between the Communion Service and the sermon, a notice of a vestry meeting. Held, that the plea was no answer to the action under the 1 *W.* and *M.* c. 18. s. 18.; for though the constable might turn the plaintiff out of church, yet he had no right to detain him in custody.

THIS was an action of assault and false imprisonment. The declaration alleged that on, &c. at *Tring*, in the county of *Hertford*, defendant assaulted plaintiff, and forced him out of a certain church into a certain highway, and compelled him to go into a certain inn, and there imprisoned him, without any reasonable or probable cause, for the space of two hours. The defendant pleaded, first, not guilty; and, second, that on, &c. divine service had been, and was, celebrating in the church in the declaration mentioned, and that during the time that divine service was so celebrating, and whilst the congregation was assembled and attending such service, plaintiff, being in the said church, illegally, intentionally, and irreverently, made and continued a noise and disturbance therein, whereby the performance of the said divine service was interrupted and disturbed; whereupon defendant, then being a constable of the township in which

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the said church was situate, in order to prevent plaintiff from further interrupting and disturbing the performance of divine service, gently laid his hands upon him, in order to remove him out of the said church, and did gently remove him thereout, and in so doing assaulted, seized, and laid hold of him, and compelled him to go out of the church into the said highway, and also into the said inn, being a reasonable and convenient distance from the church; and in order to prevent him from returning into the church during the continuance of divine service therein, and disturbing and interrupting the performance thereof, defendant imprisoned him in the said inn, and detained him there for a reasonable time, to wit, until the celebration of the service in the said church was finished, doing no unnecessary damage or violence to plaintiff, on that occasion, which, &c. Replication to the first plea, a similiter; and to the second, de injuriâ suâ propriâ; with a new assignment, that defendant had kept and detained plaintiff for one hour and a half after the celebration of the service in the said church was finished, without any reasonable or probable cause. Rejoinder took issue on the second replication. Plea, not guilty to the new assignment, and issue thereon. At the trial, before *Alexander*, C. B. at the last assizes for the county of *Hertford*, it appeared in evidence, that a short time previous to the transaction in question, the churchwardens of the parish of *Tring* had expended a sum of money in cleansing and decorating the parish church, preparatory to an annual sermon about to be preached in the church for the benefit of the Society for promoting *Christian* Knowledge. The expence so incurred gave dissatisfaction to some of the inhabitants, and a notice was prepared and signed by some of them, that a vestry meeting would be held in the church on a day mentioned, to chuse new churchwardens in the place of those then in office. This notice was delivered to the parish clerk, for the purpose of being read in the church at the usual time; but, under the direction of his superiors, he declined doing so. Several applications were made to the same

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effect, but without success. On *Sunday*, the 24th *August*, when the minister had finished the Communion Service, and was proceeding to the pulpit to preach his sermon, the plaintiff stood up in one of the pews of the church and read a copy of the notice above-mentioned in an audible voice. The defendant, who was in attendance, immediately took the plaintiff from the pew, and, by the directions of the minister, turned him out of church. The plaintiff was then taken to a neighbouring inn, and there detained until the church service was over, when he was set at liberty. It was contended at the trial, that the defendant was justified in removing the plaintiff from the church in consequence of the disturbance he had created, and that he was authorised in detaining him until divine service was over in order to prevent the repetition of a similar offence. The Lord Chief Baron was of opinion, however, that although the defendant was justified in removing the plaintiff from the church, yet he had no right to detain him in custody until service was over, and therefore that the plaintiff was entitled to a verdict for such damages as the jury thought proper to give. The jury found their verdict for the plaintiff; damages, One Farthing.

Adolphus now moved for a rule to shew cause why the verdict should not be set aside, and a nonsuit entered, on the ground that the action was not maintainable. It is perfectly clear that the conduct of the plaintiff justified the defendant, as a peace officer, in turning him out of the church; and the question is, whether he was not also justified in detaining him in custody until divine service was over. If the conduct of the defendant can be considered as a malicious or contemptuous disturbance of the congregation assembled, or a molestation of the minister who was celebrating divine service on the day in question, the further detention of him, after he was removed from the church, would be justified by 1 *Mary*, c. 3. s. 3. and 1 *W.* and *M.* c. 18, s. 18., in order that he might be dealt with in the manner prescribed by those statutes. Now the thing done by the

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plaintiff had a manifest tendency to disturb the congregation and molest the officiating clergyman. The plaintiff had no right to obtrude himself there, and distrub the celebration of divine service by giving out the notice in question; and consequently the defendant was justified in apprehending and detaining the plaintiff, at least until divine service was over.

ABBOTT, C. J.—The difficulty which presents itself to my mind is, whether, upon adverting to the language of the statutes referred to, the conduct of the plaintiff can be considered as coming within the operation of either. The language of the statute of *Mary* is, "shall maliciously, willingly, or of purpose, molest, let, disturb, &c. any parson, &c." The words of the Toleration Act are, "shall willingly, and of purpose, maliciously or contemptuously come into any cathedral, &c., or other congregation, and disquiet or disturb the same, or misuse any preacher, &c." The obvious intention of these statutes was to give to the Justices a power, which they had not by the common law, of punishing offences which were previously cognizable by the ecclesiastical law. Now if the plaintiff had read this notice whilst the minister was reading the Church Service, or preaching, which would be a manifest disturbance of him and the congregation, it might be understood to be a disturbance maliciously and of purpose; but I cannot conceive that to be a malicious and of purpose disturbance which takes place whilst the minister is neither preaching, or reading any part of the Church Service. The object of the plaintiff was to give notice of a vestry meeting, and though he had no right so to do, still I cannot consider that as a malicious disturbance either of the minister or the congregation, within the meaning of the Toleration Act, and consequently the defendant was not justified in detaining him in custody after he was removed from the church.

BAYLEY, J.—It does not appear to me that the conduct imputed to the plaintiff falls within the 18th section of the

Toleration Act. The provisions of that statute are, "that if any person shall willingly and of purpose, maliciously or contemptuously, come into any cathedral or parish church, chapel, or other congegration permitted by this act, and disquiet or disturb the same, or misuse any preacher or teacher, such person, upon proof thereof, before any Justice of Peace, by two or more sufficient witnesses, shall find two sureties to be bound by recognizance in the penal sum of 50*l.*, and in default of such sureties shall be committed to prison, there to remain till the next Quarter Sessions, and upon conviction of the said offence, at the said Sessions, shall suffer the penalty of 20*l.*" Now the object of the party must be manifestly to disturb the congregation, or misuse the minister. As far as we can understand the object of this plaintiff, it was neither to disturb the congregation, or misuse the minister, but to make some communication of a step which he had in contemplation. His conduct was, to a certain degree, a breach of that decency which all persons ought to observe in a place of divine worship, and he might be liable to be punished in the Ecclesiastical Court; but with reference to the provisions of the Toleration Act, he certainly was not liable to the proceedings there pointed out. I apprehend that the constable had authority to do no more than to remove him out of the church, and consequently, in this instance, he exceeded his authority in detaining him in custody.

HOLROYD, J.—Looking to the 1 *Mary*, c. 3. s. 3. and 1 *W.* and *M.* c. 18. s. 18. it must appear that the object of the party was to disturb or disquiet the minister, before any offence is committed within the meaning of those statutes. Unquestionably if there had been a breach of the peace committed, or if the plaintiff had offended in the manner pointed out by the Toleration Act, the constable might have taken him into custody, and carried him before a justice. The question here is, not whether the defendant had a right to remove the plaintiff for the interruption of deco-

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rum in the church, but whether the plaintiff is brought within these acts of parliament for maliciously and contemptuously disturbing the congregation or the minister, and I think he is not. The defendant had a right to remove him out of the church, but not to detain him in custody, and therefore I think this verdict is right(a).

Rule refused (b).

(a) Vide 1 Mod. 168. Sir T. Jones, 159. 11 Mod. 64. 12 Id. 610. 1 Stra. 688. 1 Ld. Raym. 62. 277. 1 Saund. 13. 1 Hawk. P. C. 271. Godb. 246. 2 Bulstr. 47. 53. Aleyn. 50. 1 Bing. 317. 1 G. 1. st. 2. c. 5. s. 4. 58 G. 3. c. 69. The Book of Common Prayer, Communion Service.

(b) *Littledale*, J. was gone to Chambers.

Monday, May 10.

GILBERT v. TOMISON.

To trespass for breaking and entering a close of plaintiff called a *garden*, the defendant pleaded an immemorial custom to search for minerals in the district within which the locus in quo was situate, "the scites of houses, &c. *gardens*, orchards, and highways excepted," and it being proved that the locus in quo was planted with shrubs within the last six years, and with potatoes just before the trespass: Held that it was a *garden* within the meaning of the exception.

TRESPASS for breaking and entering certain closes of the plaintiff called the *Fountain Gardens*, situate in the parish of *Matlock* in the county of *Derby*, for the purpose of mining. The defendant pleaded first, Not guilty; and second, an ancient custom for all the liege subjects of the realm to get lead ore in the soak or wapentake of *Wirksworth*, as well within the grounds and soil of any person or persons whomsoever within the said soak or wapentake, as in the king's grounds or soils there (*the scites of houses, churches, and churchyards, orchards, gardens, and highways excepted*), and that defendant, being a subject of the realm, broke and entered the closes in question, being parcel of the said soak or wapentake, and not being the scites of houses, churches, churchyards, orchards, gardens, or highways, to search for lead mines therein according to the custom. Replication took issue on the first plea, and then averred in answer to the second, that the gardens in question were within the exemption of the custom. Issue thereon. At the trial before *Hullock*, B. at the last *Derbyshire* Assizes, the question was, whether the locus in quo was a garden within the meaning of the exception stated in the custom. The spot, called a garden, is situate on a steep ascent called *Abraham's Heights at Matlock*, and the

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only witnesses called to prove the plaintiff's case were two of his servants, who deposed that, within the last six years, the plaintff had, for the first time, planted the spot in question as a shrubbery; and that in the month of *April* last, just before the trespass was committed, he had sown some potatoes in a part of the shrubbery, which was then for the first time called *Fountain Gardens*. At a short distance from the shrubbery was the plaintiff's kitchen garden. The question left to the jury was, whether the spot in question was in fact a garden at the time the trespass was committed. The jury found their verdict for the plaintiff, with nominal damages.

Vaughan, Serj. now moved for a rule to shew cause why the verdict should not be set aside, and a new trial granted, on the ground that the evidence was too slight to bring the locus in quo within the exception of the custom. It must be understood that the exception applied to ancient gardens, and not to such as are obviously made in modern times for the purpose of evading the operation of a custom which is for the public benefit. If it is competent for any person to plant a district of his land with a few shrubs and call it a garden, the effect must in time be to stop all mining operations in the district in question, and thereby work great prejudice to a most industrious and enterprising class of the population of the county of *Derby*. Properly speaking, however, this is only a shrubbery, and it is not the circumstance of the plaintiff having planted a few potatoes that will give it the character of a garden within the meaning of the exception.

ABBOTT, C. J.—I think this was a garden within the meaning of the exception. The exception applies to *all* gardens. The jury have found that this was a garden, and I think their verdict ought not to be disturbed.

BAYLEY, J.—It is a garden in substance.

HOLROYD, J. concurred (*a*).

Rule refused.

(*b*) *Littledale*, J. was in the Bail Court.

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Monday, May 10.

Curteis and Another *v.* E. Willes, Esq.

Where a country trader was in the habit of coming up occasionally to *London*, and staying a day or two at a friend's house, where he wrote his letters, and used to order goods to be sent to him there, and in the same street a creditor of his lived, and on a particular day he told his friend not to inform the creditor that he was in town, because the latter would be bothering him for his money; and shortly afterwards the creditor called at the house upon business, whereupon the bankrupt went into a back warehouse for ten minutes or a quarter of an hour to avoid seeing the creditor: Held, that this was a "beginning to keep house" within the meaning of 1 J.1. c. 15. so as to support a commission of bankrupt.

THIS was an action against the Sheriff of *Warwickshire* for a false return to a writ of testatum fieri facias, issued against the goods and chattels of one *Henry Crutchley*. Plea, not guilty and issue thereon. The object of the action was to try the validity of a commission of bankrupt issued against *Henry Crutchley*. At the trial before *Abbott*, C. J. at the *London* Adjourned Sittings after last term, the trading and petitioning creditors debt being admitted, the following facts were proved in evidence as to the act of bankruptcy. The bankrupt carried on the trade of a linen draper at *Warwick*. He was in the habit of coming occasionally to *London* upon business, and stopping two or three days in town. On those occasions he usually called at the house of a friend named *Corbett*, a Manchester warehouseman, in *Friday*-street, *Cheapside*, and sometimes slept there as a visitor. He wrote letters there, and used to give Mr. *Corbett*'s house as his place of reference to which goods purchased by him were to be sent. Three doors from the house of Mr. *Corbett* resided a Mr. *George Johnson*, to whom the bankrupt was indebted, and had promised payment of money. On the 15th *May* last, the day on which the act of bankruptcy was alleged to have been committed, the bankrupt, being in the counting-house of Mr. *Corbett*, requested the latter, and a clerk of his, not to inform Mr. *Johnson* that he was in *London*, for that he (the bankrupt) owed him some money on an account over due, which he could not pay, and that Mr. *Johnson* would be bothering him about it; and that if Mr. *Johnson* inquired for him, to say that he was not, or had not been in *London*. Mr. *Corbett* then observed that he expected *Johnson* there in a few minutes. Immediately afterwards Mr. *Johnson* came into Mr. *Corbett*'s warehouse, and the bankrupt observing him coming in, exclaimed, "here he comes," or

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"here *Johnson* comes; I will go below, as I do not wish to see him." The bankrupt then went down stairs into Mr. *Corbett's* lower warehouse, and remained there ten minutes or a quarter of an hour, at the end of which time Mr. *Johnson* went away, and the bankrupt was called up. Under these circumstances the question was, whether there was a valid act of bankruptcy proved to sustain the commission. The Lord Chief Justice charged the jury that this was a "beginning to keep house" within the meaning of the 1 *Jac.* 1. c. 15. and a verdict was found for the defendant.

Copley, A. G. now moved for a rule to shew cause why the verdict should not be set aside and a new trial granted, and contended that the circumstances proved, did not amount to an act of bankruptcy, within the meaning of the statute, inasmuch as the words "beginning to keep house," must be understood to mean the bankrupt's own house, or his usual place of business. Here the facts negatived that construction, and therefore, there was no sufficient act of bankruptcy to sustain the commission. But,

PER CURIAM.—We think this was an act of bankruptcy within the authority of decided cases. The case of *Bayly* v. *Schofield*(a) is decisive of the question. There, *Luckraft*, the bankrupt, being arrested at the suit of one of his creditors, was taken by the officer who arrested him, to a public house at his own desire, but escaped from the officer at the door of the house. He was immediately pursued by the officer, but fled from him into the house of a friend. The officer inquired for him there, but he being denied by some one within the house, and the door kept fast, the officer did not break it open, but departed, and did not see *Luckraft* afterwards; but the money for which he was so arrested, was paid within three or four hours after by *Luckraft's* attorney. Afterwards, on the same day, *Luckraft* was seen by a person at the house whither he fled, in a two

(a) 1 M. & S. 338.

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pair of stairs room, to whom he said, that he had been arrested on that day, and the debt was paid, but that he remained there for fear of being opposed by some other creditors. When it was dark he went home to his own house, and gave directions to deny him to any body that called, and from that time, he continued nearly a month in his bed-chamber, except coming down on Sundays for a little air. The question was, whether under such circumstances he had committed an act of bankruptcy. After argument, the Court decided that he had committed two; first, by staying at his friend's house for fear of other creditors; and second, by shutting himself up in his own bed-room with the same object. After that decision, it is perfectly clear that a sufficient act of bankruptcy was proved in this case.

Rule refused (*a*).

(*a*) Vide *Colkett* v. *Freeman*, 2 T. R. 59. *Holroyd* v. *Gwynne*, 2 Taunt. 176. *Dudley* v. *Vaughan*, 1 Campb. 272. *Robertson* v. *Liddell*, 9 East, 487. *Williams* v. *Nunn*, 1 Taunt. 270. *Chenoweth* v. *Hay*, 1 M. & S. 676. *Gimmingham* v. *Laing*, 2 Marsh. 236. S. C. 6 Taunt. 532. *Judine* v. *Da Cossen*, New Rep. 234. and *Harvey* v. *Ramsbottom*, ante, vol. ii. 142.

Monday, May 10.

DOE, on the demise of STEPHEN PITT, *v.* HOGG.

Covenant "not to let, set, assign, transfer, set over, *or otherwise part with, the premises demised, or the lease*," of a coffee house, is not broken by proof of a deposit of the lease with the brewers of the lessee, as a security for beer supplied to the house.

EJECTMENT to recover the possession of a dwelling-house, called *Grigsby's Coffee-House*, and other premises, situate in *Threadneedle Street*, in the parish of *Saint Bennett*, in the ward of *Broad Street*, in the city of *London*. Plea, not guilty, and issue thereon. At the trial, before *Abbott*, C. J., at the *London* Adjourned Sittings after last Term, it appeared in evidence that the lessor of the plaintiff had demised the premises in question, in 1812, to one *William Laming*, his executors and administrators, for the term of twenty-one years. The lease contained the usual covenants, with a proviso for re-entry on non-payment of rent, or for breach of any of the other covenants. Among

the covenants was one, "that *William Laming*, his executors or administrators, shall not, nor will, at any time or times during the term by this indenture granted, or intended so to be granted, grant any under-lease for any term whatsoever; or let, set, assign, transfer, set over *or otherwise part with* the said messuage or tenement hereby demised, *this present indenture of lease*, or his or their term or interest by these presents granted, *or any part thereof*, without the licence and consent of the said *Stephen Pitt*, his heirs or assigns, in writing, being first had and obtained." *William Laming* continued in possession of the premises under this indenture until the year 1813, when he died, leaving his property to his wife for her life. She afterwards took out administration to her husband's estate, and married a person named *Yorke*, and died in the year 1820, leaving three sons, two of whom are now living. On the 9th *October*, 1820, an agent of Messrs. *Reid* and Co., brewers, with whom the widow of *Laming* had deposited the lease, as a security for supplies of beer and porter to the house, took possession of the premises. The present defendant, who was the servant or agent of Messrs. *Reid* and Co., was soon afterwards put into possession, and was in possession at the time of the ejectment, which was brought for a forfeiture by reason of a breach of the covenant restraining the lessee, his executors and administrators, from transferring, setting over, or otherwise parting with, the indenture of lease. It was contended on the part of the lessor of the plaintiff, that the act of depositing the lease with Messrs. *Reid* and Co., as a security for the supplies of beer and porter to the house, amounted to a forfeiture within the meaning of the words of the covenant "or otherwise part with, &c." But the learned Judge overruled the objection, and directed a nonsuit, with liberty, however, to move to enter a verdict for the plaintiff.

Scarlett now moved accordingly, and contended that the lease was forfeited by the breach of the covenant above-men-

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tioned. It may be true that the act of depositing the lease may not amount to a disposition of the term demised, or the whole of the legal interest thereby granted in the premises; but it is perfectly obvious that this act amounts to a disposition of a portion of the interest, and consequently comes within the spirit, if not the letter, of the covenant. The words "part with" are synonymous with "dispose of," and in effect mean the same thing, and ought to receive the same construction. If a disposition of any part of the whole would be a breach of the covenant, then this lease has been forfeited. Here there has been "a parting with" the indenture of lease, and so long as it remains in the possession of Messrs. *Reid* and Co. they have the beneficial interest in the premises. This case is distinguishable from *Crusoe* v. *Bugby*(a), because there the words were not so strong, and the act done by the lessee was merely granting an underlease for part of the term; and the Court held that there was no breach for a forfeiture. The words of this lease are so comprehensive as clearly to embrace the act done by the lessee, and to work a forfeiture.

ABBOTT, C. J.—I am clearly of opinion that the effect of the covenant is only to restrain the lessee from completely alienating the legal interest in the premises to the prejudice of the landlord, without his consent in writing. Now here the lease has not been parted with in that, which I take to be the fair construction of the words of the covenant. All that the lessee does is to deposit the lease as a security for beer supplied to the house, which I think he was at liberty to do: The ground of my decision at Nisi Prius was, that the lease having been parted with for the benefit and advantage of the lessee himself, and not a disposition of it for the benefit of the brewers, there was no breach of the covenant. The whole mischief intended to be guarded against would be effected if we were to put any other construction upon it, because if we were to hold this

(a) Sir W. Bl. 766. S. C. 3 Wils. 234.

to be a parting with the legal interest, it must, in all cases of this description, have the effect of placing the tenant completely under the control of his landlord. The words "otherwise part with," mean "assign." Here there has been no assignment of the legal interest, and I think there is no ground for disturbing the nonsuit.

Bayley, J.—I am of the same opinion, and think this case is not distinguishable from *Crusoe* v. *Bugby*, where the covenant on which the question arose was, "that the lessee, his executors or administrators, shall not, nor will at any time or times during this demise, assign, transfer, or set over, or do, or otherwise part with, or put away, this present indenture of demise, or the premises hereby demised, or any part thereof, to any person or persons whomsoever, without the licence and consent of the lessors, &c. being first had and obtained." The question there was, whether the fact of the lessee having granted an under lease of the premises worked a forfeiture, and the Court said, "the Courts have always held a strict hand over these conditions for defeating leases. Very easy modes have always been countenanced for putting an end to them. The lessor, if he pleased, might certainly have provided against the change of occupancy, as well as against an assignment, but he has not done so by words which admit of no other meaning. *Assign, transfer*, and *set over*, are mere words of assignment—*otherwise, do*, or *put away*, signifies any other mode of getting rid of the premises entirely, and cannot be confined to the making an under-lease." That is an authority in point, and the words here must receive the same construction. The lessee has only deposited the lease as a security, which it was competent for him to do. There is no "parting with the legal interest" within the meaning of the covenant, because the lessee might at any time redeem the indenture by paying off the incumbrance upon it.

The other Judges concurred.

Monday, May 10.

Where to a declaration for a libel, imputing to the plaintiff barbarous cruelty to his horse, the defendant pleaded pleas of justification; first, that the libel was true in all its particulars; and second, that it was true in substance and effect, and the jury found that the first plea was true with the exception of two statements, containing particulars of aggravated cruelty to the horse, and that the second was true in substance and effect, and gave a shilling damages, subject to the opinion of the Court as to the propriety of their verdict: Held, that their verdict was right. A plea, stating that libellous matter complained of, "is true in substance and effect," means, that it is true in every material particular.

WEAVER *v.* LLOYD, Gent.

CASE for a libel published in the *Oxford Journal*, of and concerning the defendant's conduct, in his treatment of a horse, in riding from *Oxford* to *Abingdon*. Plea, first, not guilty; second, that the matters contained in the alleged libel, were true in every particular; and third, that the several matters in the supposed libel contained, at the time of composing and publishing thereof, were true in substance and effect. Issue on these pleas. At the trial before *Garrow*, B. at the last Assizes for *Oxfordshire*, several witnesses were called to prove the defendant's pleas of justification. The jury under the learned Judge's directions found specially, as to the second plea, that all the matters stated in the libel were true, with the exception of two statements, namely, first, "that on reaching *Abingdon*, the horse presented a shocking spectacle, having an eye literally knocked out;" and secondly, "that plaintiff being conscious that its condition would excite attention, he ordered the person who had the care of the horse, not to let any one go into the stable to see it;" and as to the third plea, they found that the matters contained in the libel were true in substance and effect, and gave for the plaintiff one shilling damages, if the Court should be of opinion that the want of proof of the two statements above-mentioned, did not render their verdict incorrect.

W. E. Taunton now moved to enter judgment for the defendant non obstante veredicto. The particulars which failed in proof in support of the second plea of justification, were altogether immaterial, because the paragraph of which the plaintiff complains, would be equally libellous if those allegations had not formed part of it. It appeared in evidence, and was stated in the libel, that the plaintiff in riding

from *Oxford* to *Abingdon*, had brutally and unmercifully beaten his horse, but though neither of the horse's eyes was literally knocked out, yet the animal had been so dreadfully injured, that it was necessary to bind up both his eyes, and it was in evidence that he could not see with either for three or four days. In the result, the animal recovered the use of both his eyes, under the skilful treatment of a farrier. It must be admitted then, that there was no proof that either of the animal's eyes was knocked out, but it is submitted that the want of proof of the truth of this allegation will make no difference. The case of *Edwards* v. *Bell* (*a*) seems to be an authority for this. That was an action for a libel against the printer of a newspaper. The plaintiff was minister of a dissenting assembly or congregation, at *Great Marlow*, in *Buckinghamshire*. The paragraph complained of was to the following effect: "A serious misunderstanding has taken place between a dissenting minister at *Great Marlow* and his congregation. The cause of it originated out of some prejudicial reflections thrown out by the minister, against a young lady of great accomplishments and spotless reputation. The matter, we understand, is about to be taken up with a strong hand." The defendant pleaded a justification of the alleged libel, which failed in proof in two particulars; first, that it did not appear that any serious misunderstanding had taken place between the minister and his congregation; and second, that, instead of proving, as was alleged, that the plaintiff had delivered the offensive words complained of from the pulpit, he had, in point of fact, delivered them from a tent or other station assigned to him. The Court, after a verdict found for the plaintiff, allowed judgment to be entered for the defendant non obstante veredicto. It cannot be denied that these parts of the libel in that case were material in aggravating the character of the libel. In the present case the libel was proved to be true in most of its material circumstances. It was proved that the animal presented a shocking spectacle, and

(*a*) Not in print.

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though the eye was not literally knocked out, yet that was only one of the circumstances entering into the description of the barbarity alleged. The third plea was completely made out in evidence, and on the authority of the case cited, the Court will give judgment for the plaintiff non obstante veredicto.

ABBOTT, C. J.—I am of opinion that neither of the defendant's pleas was proved. I take it that the two statements which remain unproved, were material parts of the libel; first, the particular description of the state of the horse, in alleging that his eye was literally knocked out; and secondly, in stating that the plaintiff had ordered a person who had the care of it, not to allow any body to see the horse. The defendant, by his second plea, undertakes to prove the whole truth of the libellous matter. He has failed to make out these two material allegations, and therefore that plea cannot be supported. Then as to the third, I am of opinion that when a defendant says that a libel is true in substance and effect, that must be understood to mean, that every material particular contained in it is true. The defendant, therefore, has not proved the truth of his third plea, and consequently the verdict must stand.

BAYLEY, J.—I am of the same opinion. The defendant's pleas of justification go to the whole matter contained in the libel, and consequently he is bound to prove every material circumstance justified. I am of opinion that both the circumstances which failed in proof, were material parts of this libel. It is alleged that the plaintiff was guilty of barbarity towards his horse by beating, whipping and spurring him, and that the animal presented a shocking spectacle, and that one of his eyes was literally knocked out. Taking it that the substance of the libel was in treating the animal with barbarity, still the allegation of having knocked the eye out, was an excess of barbarity which was not proved. It is a general rule, that the justification must go

the whole length of the libel in all its material parts. This justification does not go that length, and therefore there is no ground for disturbing the verdict.

HOLROYD, J.—If Mr. *Taunton's* argument could prevail, it must go this length, that where a libel charges a plaintiff generally, with cruel usage to his horse, and then goes on to describe the particulars of that usage minutely, it is sufficient for a defendant in his justification, to prove the cruel usage generally, without proving any of the particulars of it. I have never understood that to be the rule; on the contrary, I apprehend it has always been held, that in order to support a plea of justification in an action for a libel, all the libellous matter must be proved to be true in its particulars. That certainly has not been done in the present instance, and therefore these pleas being unsupported by the evidence, the declaration remains unanswered, and the plaintiff is entitled to a verdict.

LITTLEDALE, J.—The defendant's evidence has failed him in the most important part of the case, for the most serious and defamatory charges contained in the libel, turn out to be wholly unfounded in truth. It is, as it appears to me, a much more offensive thing to publish of a man that he has knocked his horse's eye out, and that having done so, he has given orders to prevent any person from examining it, than merely to say, in general terms, that he has been guilty of cruel usage towards his horse, and rendered it a shocking spectacle. Such a detail of particulars following the general charge, goes to the very gist of the action, because they are matters of great aggravation, which must naturally and properly tend to increase the quantum of damages. I am therefore clearly of opinion, that these pleas are unsupported by evidence in the most important particulars, and that they present no sufficient answer to the action.

Rule refused.

Monday, May 10th.

Cross *v.* Lewis.

Twenty years' uninterrupted enjoyment of windows, looking upon the land of another, is sufficient ground for presuming a grant or licence to open the windows, in the absence of evidence to the contrary.

Where A. had enjoyed lights made in a building not erected at the extremity of his land, looking upon the premises of B., without interruption for at least 38 years, and there was no evidence of the time when the lights were first put out, and C. the purchaser of B.'s premises, erected in their stead a building which obstructed A's lights: Held that an action was maintainable for the obstruction, though there was no proof of knowledge in B. or his agents, of the existence of the windows.

CASE for obstructing four ancient windows in plaintiff's house. Plea, not guilty, and issue thereon. At the trial before *Holroyd*, J., at the last Assizes for *Lancashire*, it appeared in evidence, that the plaintiff's house was situate at *Blackburn*. The defendant having bought some neighbouring premises from Dr. *Heber*'s family, took them down, and in their place erected a high building which it was admitted diminished the quantity of light before entering at the plaintiff's windows. Between the plaintiff's and the defendant's premises, in the direction towards the building of which complaint was made, there was a yard or passage, into which the windows looked, belonging to the plaintiff, of three feet seven inches in width, which went along the whole line of his house, and formed an easement to his premises. Between the building in question and the plaintiff's house, there was a space altogether of fourteen and a half feet. There was no evidence whatever of the time when the plaintiff's four windows were first put out, but one witness deposed that he remembered them thirty-eight years. It was proved that the defendant took possession of the premises which he had pulled down, about a year previously to the erection of the building in question, and that a Mrs. *Percy* had occupied the premises bought by the defendant, for twenty years, whilst they were the property of Dr. *Heber*'s family, but on what terms she occupied was not known. It appeared that Dr. *Heber*'s family lived in a distant part of *Shropshire*, and there was no evidence that any agent on behalf of the family had been in *Blackburn* to survey the premises during the time they were in Mrs. *Percy*'s occupation. On the part of the defendant it was contended, first, that in consequence of the local situation of the plaintiff's premises, the usual doctrine whereby leave and licence from

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the owner of the adjoining land, to open windows, might be presumed, did not apply, inasmuch as the windows in question, might have been put out without any licence whatever; and second, assuming that doctrine to apply notwithstanding the situation of the premises, still it could not come into operation for want of notice to the original proprietor of the land whereon the defendant's building was erected, and *Daniel* v. *North* (*a*) was cited. The learned Judge was of opinion that the plaintiff had made out a primâ facie case to entitle him to a verdict; and, in the absence of evidence to the contrary, he directed the jury to presume, that these were ancient lights, inasmuch as they appeared to have existed without interruption or obstruction for a period of at least thirty-eight years; but on the authority of *Daniel* v. *North* his lordship gave leave to move for a new trial, if the Court should differ from him as to the propriety of his direction. The Jury, under his lordship's directions, found their verdict for the plaintiff, with nominal damages.

J. Williams now moved for a rule nisi for a new trial, and renewed the objections taken at Nisi prius. First, the usual doctrine of presumption as to the existence of a grant or agreement, does not arise in this case, for this plain reason, that the windows in question might originally have been put out without any licence whatever from anybody. A man may build to the extremity of his own land, and open what windows he pleases, subject, however, to have them obstructed by his neighbours, who have an equal right to build in the same manner. It is only in cases where the act is originally unlawful, or wrongfully done, that the doctrine of presumption by acquiescence, arises. In such cases, from lapse of time, a grant or licence to do the thing which is primâ facie unlawful, may be presumed, or a right may be acquired, in consequence of the acquiescence of those who have slumbered over their own interests. Here there was

(*a*) 11 East, 372.

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no necessity for any grant or licence whatever, because the original proprietor of the plaintiff's house might lawfully put out these windows, and therefore the doctrine of presumption does not apply. He referred on this point to the observations of *Abbott*, C. J. in *Doe* v. *Reed* (a). Then secondly, assuming that the doctrine of presumption as to the existence of a grant may be let in, still it can only apply where there is notice shewn to have been given to the owner of the adjoining land, or that he or some authorised agent was privy to the existence of the windows and acquiesced in their continuance. The case of *Bradbury* v. *Grinsell* (b), upon which *Daniel* v. *North* was founded, is an authority for the principle that no presumption can be made against the owner of property unless knowledge is shewn in him of the existence of the circumstances from which the presumption is to be drawn. This doctrine was carried still farther in *Wood* v. *Veal* (c), where a lease for ninety-nine years was granted of buildings to which a public right of way was claimed, and there, *Abbott*, C. J. ruled "that nothing done by the tenants during the continuance of the lease, without the authority of the landlord, could prejudice his reversionary rights." Here no notice to, or knowledge of the existence of these windows was brought home to the original proprietor of the defendant's premises, or his agent, so as to fix him with cognizance of what had taken place, and therefore the finding of the jury ought to have been for the defendant on that point. That was a question of fact for the jury, and not of presumption as matter of law for the judge. On these grounds the defendant is entitled to a new trial.

Abbott, C. J.—I am of opinion that the direction of my brother *Holroyd*, to the jury, was perfectly correct. The expressions used by me in *Doe* v. *Reed* were with reference to the case then before the court, and such as I see no occa-

(a) 5 B. and A. 232. (b) 2 Saund. Rep. in the notes, 175, *d. e.*

(c) Ante, Vol. i. 21.

sion now to alter, because they were intended to apply to the matter then under consideration, and not to be laid down as a general rule applicable to all cases. If the doctrine now contended for by Mr. *Williams*, arising from the fact that the plaintiff's house did not stand on the very verge of his land, but that he had an interval of four feet without the wall in which the windows were put out, was to decide this case, I am sure, that a great number of the actions tried for obstructing lights, in which the plaintiffs had obtained verdicts without question, would be open to the imputation of having been determined on a wrong principle, because in no one of the cases which have been decided, was the plaintiff's house standing on the extreme verge of his land, but some little yard or passage was left between his own house and that of his neighbour. It seems to me therefore, that the verdict was perfectly satisfactory as respects that point. As to the second objection, if it had appeared upon the evidence that the windows had been opened during the occupation of Mrs. *Percy*, who was tenant to Dr. *Heber*, I should have thought there was great weight in the argument, but there is no proof of that fact. The memory of the witness does not carry back the date of the existence of the windows and the tenancy of Mrs. *Percy* to the same period; but if that had been done, then it would become material to enquire, whether, when the witness first knew the windows, they had the appearance of old windows; for if the evidence proved that they were ancient lights, and shewed that for thirty-eight years at least they had been enjoyed, without any proof of the commencement of their existence, every presumption must be made in their favour. Therefore, I think my brother *Holroyd* was perfectly right in directing the jury to presume a right in the plaintiff to put out these windows, with the assent of the neighbouring occupier, unless something was offered on the other side to rebut that presumption.

BAYLEY, J.—I am also of opinion that my brother *Hol-*

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royd's direction to the jury was perfectly correct in point of law. I do not say that twenty years possession of an easement will found a legal right to its enjoyment; but I take this to be quite clear, that if there has been an uninterrupted possession of light, of water, or of any other easement for twenty years, it affords a ground for presuming a right, and if there is nothing to rebut the presumption, a jury should not be left to guess and conjecture and run in opposition to this presumption, but should be directed to act upon it. In *Darwin* v. *Upton* (*a*), which was an action on the case for obstructing the plaintiff's lights, [illegible] proved an uninterrupted possession of them for twenty-five years, it was held, that so long a possession was such decisive presumption of a right by grant or otherwise, that unless contradicted, or explained, the jury ought to believe it. In *Bealey* v. *Shaw* (*b*) Lord *Ellenborough* says, "I take it that twenty years exclusive enjoyment of the water in any particular manner affords a conclusive presumption of right in the party to enjoy it derived from grant or act of parliament." Since the case of *Darwin* v. *Upton* it has been the understanding of the profession, that if a twenty years possession of lights is proved, and there is nothing to rebut the presumption of right, the jury are not to be left to conjecture and guess, but are to presume that that right has been constantly enjoyed, and has been enjoyed because nobody had the power to prevent it. Mr. *Williams* says, that in order to draw a presumption of this kind, the act itself must originally have been illegal. That is contrary to every principle of law, as applied to the case of lights, because in every instance, whether a man builds on the extremity of his own land or not, he is at liberty to make in his own walls what openings he thinks fit, and having made them, he may fill them up with glass or any other transparent substance, though he overlooks his neighbours. The neighbour, indeed, is entitled to build up his own wall in opposition,

(*a*) 2 Saund. in notes, 175. *c. d.* (*b*) 6 East, 207.

and he has also the same right to open windows. But if A. opens lights overlooking the land of B., and a period of twenty years is suffered to elapse without any interruption of his enjoyment, such an uninterrupted possession is sufficient to found a presumption that A. had originally leave and licence to open those lights, and that there was a bargain on the part of B. not to obstruct them. But this is not merely the case of a twenty years enjoyment and possession, it is the case of a possession the commencement of which it is impossible to ascertain. The windows were proved to have existed as far back as thirty-eight years; but that was not the commencement of their existence, they might have commenced at a more distant period. It might have been that at the time this house was erected the land on both sides belonged to the same person, who reserved to himself the right to keep those windows in the state in which they were at the time he parted with the land on which the defendant's premises are built. It seems to me, therefore, that if in this case it had been left to the jury to say whether there was or was not a right to these windows, and they had found that there was no right, it would have been the duty of the Court to say that they had given a wrong verdict, and to have granted a new trial. When there was evidence in this case to found the presumption of right, and nothing to rebut it, the jury had no discretion to exercise; the learned judge was bound to direct them in point of law, to find in favour of the right. The case of *Daniel* v. *North* shews, that when the origin of the right claimed can be traced, the doctrine of presumption is at an end. In that case, the precise time when the windows were put out, was ascertained, and upon that ground the Court determined against the presumption of a grant as against the landlord, there being no evidence to shew that they were put out with his knowledge. Here it is not necessary to presume a grant, but that something was done at the time the plaintiff's building was originally

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erected which took away from the proprietor of the adjoining land the right to dispute the propriety of opening these windows. After enjoyment for thirty-eight years, and there being no proof of the origin or commencement of the windows, I think the learned Judge was correct in telling the jury that they had no right to exercise any discretion upon the subject, but, in the absence of evidence to the contrary, were bound to presume a right in the plaintiff to maintain the action.

LITTLEDALE, J.—I think there is no ground for disturbing this verdict. As to the first point, namely, that the situation of these premises rendered it impossible to apply to this case the usual doctrine of presumption with respect to grants, I think it is not tenable, because it appears to me to be immaterial whether the premises were built up to the extremity of the plaintiff's land or not, with reference to the doctrine of presumption. It is lawful for a man to build on his own land where he pleases, and open windows where he pleases. It sometimes happens that a man covenants not to open windows so as to overlook his neighbour's premises, but where there is no restriction of that kind he may put out lights where he pleases. The rule of presumption, as to lights, is perfectly different in its application to the case of a right of common, and a right of way. In the case of a right of common or a right of way, the party who attempts to assert the one or the other illegally, would be a trespasser; but there is nothing illegal in putting out lights, and therefore it does not appear to me that the local situation of the premises makes any difference in applying the doctrine of presumption to this case. Then, as to the second ground, it appears that these lights have existed for at least thirty-eight years, and that during all that time the enjoyment of them has been uninterrupted. No proof was offered of any interruption, and therefore, in the absence of any evidence to the contrary, it must be presumed that these lights were put out originally under such circumstances as

would enable the plaintiff to maintain his action for obstructing them.

HOLROYD, J.—I told the jury that upon the evidence adduced in support of the plaintiff's right, these must be taken to be ancient windows, because they appeared primâ facie to have been enjoyed from all time without interruption. There being no evidence to shew when they were first put out, or that they were enjoyed otherwise than as of right, I was of opinion the jury were bound to presume a grant, and that the plaintiff had a right to maintain his action. My Lord, and my learned brothers, being of opinion that my direction to the jury was correct in point of law, I will only add, that in some cases, occupation and uninterrupted enjoyment alone, for a length of time, constitute evidence of a right. That is so in the case of water. With respect to the enjoyment of lights, I take it, that a man may erect a house on his own ground with lights looking upon the ground of another; and if he is permitted to enjoy them for a length of time without obstruction or interruption, they are to be considered as ancient lights, and he may prescribe for them. I see no reason for altering the opinion which I gave at Nisi Prius, and therefore I think this rule ought to be refused.

Rule refused.

SHAW v. HISLOP.

Monday, May 10.

Where goods were ordered by one of two chapel-wardens, for the use of the church:—Held, that the warden giving the order might be sued separately, without joining his brother officer.

After plea in abatement found against a defendant, the Court will not grant a new trial, even upon payment of costs.

ASSUMPSIT for goods sold and delivered. The defendant pleaded in abatement, that the promises in the declaration were made by himself and one *Twyford*, jointly.—Issue

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thereon. At the trial before *Holroyd*, J. at the last assizes for *Lancashire*, it appeared in evidence, that the defendant and *Twyford* were chapel-wardens of *St. Ann's* church, *Manchester*. The goods, which were the subject of the action, had been ordered by the defendant *Hislop* alone, and had been supplied by the plaintiff for the use of the church. There was no evidence to fix *Twyford* personally with liability. The plaintiff had a verdict of 32*l.* 9*s.* 4*d.*: and,

Tindal now moved for a new trial; and contended, that the two chapel-wardens ought to have been sued jointly, and that one alone was not liable for the debt. In point of law, it must be taken that the order of one is the order of both. The order given by the defendant *Hislop* was within the scope of his employment as chapel-warden; and as it was perfectly notorious that both acted, although both did not give the order in this instance, they ought to have been sued jointly.

PER CURIAM.—There was no necessity to join both chapel-wardens in the action. The plaintiff knows nobody but the person who gives him the order, and therefore that person is primarily liable to him. The only question is, what pocket the money is immediately to come out of. This verdict will not prevent the defendant from resorting to *Twyford* for contribution, and both may reimburse themselves by means of a rate upon the parishioners.

Tindal then moved, on payment of costs, for a new trail upon an affidavit of surprize, to the effect that the defendant expected the plaintiff's witness would prove that *Twyford* was present when the order was given, and therefore he did not come prepared to prove that fact by other evidence; but

PER CURIAM.—We know of no instance in which a new trial has been granted upon payment of costs in a case wherein the defendant has pleaded in abatement.

Rule refused.

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EDGE v. FROST.

Tuesday, May 11.

Where, on the trial of an action upon a guarantee for the payment of work done for a third person, the plaintiff at first shaped his case upon the guarantee, but afterwards resorted to the common counts, and made out the defendant's liability as a principal, and recovered a verdict on those counts: Held, that the verdict could not be disturbed. *Semble*, however, that the bail would be discharged.

ASSUMPSIT upon a guarantee. The first count of the declaration stated, that plaintiff, at the request of defendant, would perform and complete certain works, and furnish the necessary materials for putting up a gas apparatus, for lighting with gas a certain theatre or place of public entertainment known by the name of "The *Royal West London Theatre*," for *John Brunton*; said work to be performed in a scientific manner, as should be thought necessary and approved of by one Mr. *Evans*, he, defendant, undertook and promised plaintiff that he would see plaintiff paid for said gas apparatus. Averment, that the work was performed in a scientific manner, and as was thought necessary and approved of by Mr. *Evans*; that *J. Brunton* refused to pay for the same, of which refusal defendant had notice, and that defendant thereby became liable. There were two other counts upon the guarantee, and the common counts for work and labour, &c.—Plea, non assumpsit, and issue thereon. At the trial before *Abbott*, C. J. at the sittings in *Middlesex* after last term, it appeared in evidence, that *John Brunton*, being the lessee of the theatre in question, applied to the plaintiff to fit the building up with the necessary apparatus for lighting it with gas. After the work was commenced, the plaintiff became doubtful of *Brunton*'s ability to pay the expence of the apparatus ordered, and refused to go on with it until he had the guarantee of some respectable person. The plaintiff was referred to the defendant, who gave him the following written undertaking: "*Royal West London Theatre, Monday*, 9 *Sept*. 1822. I hereby undertake to Mr. *Thomas Edge*, to see him paid for the gas apparatus he has put up and furnished for Mr. *John Brunton*, according to the work, to be performed in a scientific manner as shall be thought necessary and approved by Mr.

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Evans, the superintendant of the gas works in *Peter Street*. (Signed) *John Frost*." Upon receiving this guarantee, the plaintiff proceeded with the work, completed it, and *Brunton* being unable to pay the amount, the present action was brought. At the trial, the plaintiff shaped his case, in the first instance, entirely upon the guarantee; and the case of *Matson* v. *Wharham* (a) was cited as an authority for the position, that there is no distinction between a promise to pay for goods furnished for the use of another made *before* they are delivered, and one made *after;* but in the course of the cause it came out in evidence from the plaintiff's witnesses, that the defendant had himself given orders about the work both before and after the guarantee was given; and at the suggestion of the learned Judge, the plaintiff then resorted to the common counts, so as to fix the defendant's liability as a principal. On the part of the defendant, evidence was produced to shew, that although he had formerly some interest in the theatre, yet, at the period in question, he had nothing whatever to do with it, and that the work in question was not done for his benefit. The Lord Chief Justice left it to the jury to determine, whether the defendant, although he had no interest in the theatre at the period in question, was not one of the persons who had originally given orders for the gas apparatus; for if he was, a verdict might be recovered upon his own personal liability, without regard to the guarantee. The jury found their verdict for the plaintiff, for the sum demanded, on the common counts for work and labour and materials found, declaring their opinion to be, that the defendant was one of the persons who originally gave the order for the work.

Chitty now moved for a new trial, on the ground that if the plaintiff was entitled to maintain his action, it must be upon the guarantee, and not upon the common counts, because it was quite evident, from the terms of the guarantee

(a) 2 T. R. 80.

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itself, that the work was to be done, not for the defendant, but for *Brunton*. The question is, how the parties themselves understood the instrument, and the nature of their obligations; and the case is not to be determined by any incidental or collateral circumstances, importing a liability on the part of the defendant as a principal. The plaintiff himself shaped his case entirely upon the guarantee, which shews that he never considered the defendant liable as a principal. It was at the suggestion of the judge that the common counts were resorted to; but it is submitted, that it was not competent to the plaintiff, after he had launched his case upon the guarantee, to resort to the defendant's liability as a principal. At all events this is a case in which the bail ought to be relieved, the defendant having failed to recover upon the guarantee. For this he cited *Caswell* v. *Coare* (a).

ABBOTT, C. J.—I desired the jury to say whether the defendant was one of the original employers of the plaintiff, and as they found that he was, it is perfectly clear that the plaintiff is entitled to a verdict on the common counts for work and labour and materials found. If the bail are entitled to any relief, that must be the subject of a separate application.

The other judges concurred, and intimated an opinion that the plaintiff might have recovered upon the guarantee, inasmuch as it amounted to an undertaking to see the plaintiff paid at all events.

Rule refused.

(a) 2 Taunt. 107. Vide 1 Saund. 211, in note *a*. and Cowp. 227.



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Tuesday, May 11.

Doe demise Lucy Crump, Widow, v. R. Sparkes, and Another.

Testator devises to his daughters J. and E. "their heirs, executors and administrators, equally between them, all and every his messuages, lands, tenements and hereditaments, both freehold and leasehold, in, &c. to have and to hold to the said J. and E. their heirs, executors and administrators equally." Held, that the testator by this devise, passed all his interest in the estates to his daughters in fee, to the exclusion of his right heirs.

EJECTMENT for certain freehold and leasehold premises, situate in the parish of *Worplesdon*, in the county of *Surrey*. Plea, the general issue. At the trial before *Alexander*, C. B. at the last Assizes for the county of *Surrey*, it appeared in evidence that the lessor of the plaintiff claimed the property in question as the right heir of one *William Cross*, who died seised thereof, in 1719, leaving a will of lands and other property, as after mentioned. The testator had been married twice, and upon each of his wives made a settlement, and thereby limited the estates respectively to the use of himself and wife, and the issue of the marriage, and then to the use of his right heirs for ever. By the second marriage he had two daughters, named *Jane Cross* and *Elizabeth Cross*, and by his will dated 22d *May*, 1714, he devised as follows; "I give and devise to my daughters, *Jane Cross* and *Elizabeth Cross*, their executors and administrators, equally between them, all and every my messuages, lands, tenements and hereditaments, both freehold and leasehold, in *Worplesdon*, *Wokeing*, and *Stoke* next *Guildford*, in the county of *Surrey*, and in *Lymster*, in the county of *Sussex*, or elsewhere in the kingdom of *England*, to have and to hold, to the said *Jane* and *Elizabeth Cross*, their heirs, executors and administrators, equally. Item, I give and devise to my loving wife *Joan*, during her widowhood, the use of all such household goods, linen, bedding, and utensils of household, as shall be sufficient for her own private use, and after her decease, or determination of her said widowhood, I give the said goods and chattels to my said two daughters equally, and I give unto my said two daughters all other my goods and chattels after my debts shall be paid, and my funeral expenses discharged; and I nominate

my said two daughters, *Jane Cross* and *Elizabeth Cross*, executrixes of this my will." In 1719, the testator died without revoking or altering his will. The defendants claimed the property in question, as the descendants of the two daughters by the second marriage, and the lessor of the plaintiff claimed as the testator's right heir by the first marriage. The question at the trial was, whether the devise above mentioned was sufficient to pass the whole legal interest to the daughters of the second marriage in the estates in question, so as to extinguish all reversionary interest in the testator's right heirs. The learned Judge was of opinion that the will of the testator passed the whole of his interest to his daughters in fee, and therefore directed a nonsuit.

Taddy, Serj. now moved for a new trial, and submitted that the effect of the will was not to pass the whole of the testator's interest to his daughters by the devise. The daughters of the second marriage took only estates tail, and after their estates were extinct, the interest in reversion went over to the testator's right heirs. He cited *Roe* v. *Avis* (*a*), and contended, on the authority of that case, that the devise did not pass the whole interest to the two daughters.

Abbott, C. J.—The general rule of law is, that if the words of a will are sufficient to carry every interest which the testator has, they must be understood to carry every interest, unless there be something manifestly shewing that the intention is not to pass all, but a part. I cannot find any thing in the language of this will; shewing that the testator did not mean to give his daughters all he had.

Bayley, J.—The intention here is perfectly plain, and shews that the testator meant to devise the whole of his interest.

(*a*) 4 T. R. 605.

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HOLROYD, J.—I also think the words of this will sufficient to pass to the daughters the whole of the testator's interest. The case of *Roe* v. *Avis* is distinguishable from this, because there the testatrix, after devising her estates to *A.* and *B.* and their heirs, &c. devised "all the residue and remainder of her estate and effects to be sold as soon as might be after her death, and her funeral expenses to be paid thereout, and the overplus, if any, to be divided between *D.* and *E.*" This particular limitation shewed that the intention of the testator was not to exclude the reversion. Now here the testator plainly meant to pass all he had to his daughters in fee.

LITTLEDALE, J. concurred.

Rule refused.

Tuesday, May 11.

DOE demise Lord HUNTINGTOWER v. J. CULLIFORD.

A notice dated 27th and served on the 28th *September*, requiring a tenant to quit "at *Lady-day* next, or at the end of his current year," must be understood to mean a six months', and not a two days' notice to quit.

EJECTMENT for a dwelling-house and an acre of land, with the appurtenances, situate in the parish of *Ilchester*, in the county of *Somerset*. At the trial before *Burrough*, J. at the last Assizes for *Somersetshire*, a verdict was found for the plaintiff.

Manning now moved for a rule nisi to enter a nonsuit for an objection to the terms of the notice to quit. The defendant was admitted into possession of the premises in question on the 4th *August*, 1821, as tenant to the plaintiff. On the 28th *September*, 1822, a notice to quit was served upon the defendant in the following terms: "*James Culliford;* I give you notice to quit the house and land you rent of me in the parish of *Ilchester*, and to deliver up the same to me or my heirs or assigns, at *Lady-day* next, or at the end of your current

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year. Dated this 27th *September*, 1822." This, he submitted, was an insufficient notice, inasmuch as it having been dated on the 27th *September*, it would apply to the *then current* year ending on the 29th *September*, in which case the defendant would only have two days' notice to quit. The notice ought to be construed strictly, and the Court are bound to assume that the landlord meant to give his tenant nothing but a legal notice. This is not a legal notice, and therefore the defendant is entitled to have a nonsuit entered.

ABBOTT, C. J.—There is no valid objection to this notice. There is one rule of construction in cases of this nature, which is no less sound than ancient, namely, to give such a sense to ambiguous words, as will effectuate the intention of the parties. Applying that rule to this case, it appears to me that the words "at the end of your current year," may be understood to mean the end of the current year ending at the ensuing *Lady-day*. The words, I think, are plainly applicable to the current year ending at *Lady-day*, 1823.

BAYLEY, J.—We are to look to the intention of the landlord. When general language is used, which is open to doubt, the rule is to make it sensible, not insensible. The state of the defendant's holding, shews it to be quite clear that the landlord did not mean the year ending at *Michaelmas* day. He could not intend to give a notice to quit in two days, because that would be no notice whatever. By mentioning *Lady-day* next, it is clear he meant to give a six months' notice, or such a notice as the law required. He intended to give an effective notice, and it is quite sufficient if the tenant understands what is meant.

The other Judges concurred.

Rule refused.

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Reed *v.* The Inhabitants of the Hundred of Gainsbury.

To support an action upon the 9 Geo. 1. c. 22. s. 8. against the hundred, for the wilful and malicious destruction of stacks of corn by fire, it is sufficient to give such evidence as may reasonably induce the jury to believe that the fire was wilful and malicious. Where a declaration upon this act alleged the notice of the fire to have been given to the *parish*, instead of to the *town*, *village*, or *hamlet*, as required by the statute: Held, that the objection was cured by the verdict.

ACTION on the 9 Geo. 1. c. 22. s. 8. against the hundred of *Gainsbury*, in *Somersetshire*, to recover the value of a stack of corn, the property of the plaintiff, alleged to have been wilfully, maliciously and feloniously set on fire and consumed, by some person or persons unknown to the plaintiff. At the trial before *Bosanquet*, Serjt. at the last *Taunton* Assizes, it appeared in evidence, that the stack in question was destroyed by fire, on *Christmas* Eve, 1823. The stack was situate in the angle of an inclosed field, at the junction of two roads, a few yards distant from the highway. No direct evidence was given that the stack was wilfully and maliciously ignited, and the only proof from which a wilful and malicious act could be implied, was, that some of the inhabitants of the neighbourhood, returning home from their *Christmas* festivities, about two in the morning, saw two strange men standing talking together, by a gate which led into the close where the stack was situate. The men were not spoken to by the passengers, but in a short time afterwards the stack was observed to be in flames, and was soon consumed. It was contended, on the part of the defendants, that this evidence was insufficient to go to the jury, to shew that the stack had been wilfully and maliciously set on fire, so as to entitle the plaintiff to recover. The learned judge thought there was sufficient evidence from which the jury might reasonably draw the conclusion that the stack was wilfully set on fire, and left the case to them with that direction. The jury found for the plaintiff, damages £100.

Wilde now moved for a rule to shew cause why there should not be a new trial granted, or why the judgment

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should not be arrested. In support of the first part of his motion, he contended that there was no evidence from which the jury could reasonably draw the conclusion, that the fire was wilful and malicious. Admitting, that, in support of this action, the same positive and direct proof would not be required as in a prosecution against a person for the felony, still there ought to be such cogent evidence as could leave no room for the jury to doubt that the fire was wilfully and maliciously kindled. Now for any thing that appeared, this fire might have arisen from accidental causes, particularly at that season of the year, when the inhabitants of the surrounding neighbourhood were returning, perhaps, with lighted tobacco pipes, from their *Christmas* festivities. No proof whatever was given of the manner in which the fire was kindled. All the evidence was consistent with an innocent cause of misfortune; and in the absence of any proof of an unlawful act, the jury ought not to be directed to draw a conclusion which the evidence could not fairly warrant. The onus lay upon the plaintiff to give, at least, reasonable evidence of a wilful and malicious act, before the hundred could be charged. Then in support of the motion to arrest the judgment, he submitted that the declaration was ill, for not pursuing the language of the statute. The allegation in the declaration was, that notice of the fire was given within two days, to the inhabitants of the *parish*, near the place, &c. instead of the "*town, village*, or *hamlet*," which are the words of the act. It is quite obvious that the legislature intended that the notice should be given to the inhabitants of a place where there is a congregation of houses, and where the transaction may become immediately notorious, and enable the inhabitants to raise the country by hue and cry upon the felons, if a felony was actually committed. This could not be so well answered, by giving notice to the parish, which is a mere ecclesiastical division, and in which there may be but very few inhabitants. The omission of the word "parish" in the statute, shews that the legislature considered a notice to the parish insufficient. It is alleged

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in the declaration, that the notice was given "according to the form of the statute." This was not so, and therefore it is a good objection in arrest of judgment. The statute, though remedial as to the plaintiff, is strictly penal as to the defendant, and ought to be construed accordingly. *Norris* v. *The Hundred of Gawtry* (a).

Abbott, C. J.—I am of opinion that there is no ground either for granting a new trial, or for arresting the judgment. In order to support the allegation, that the fire was wilful and malicious, it is not necessary to give distinct and positive evidence of a wilful and malicious act. It is enough, if reasonable evidence be adduced to satisfy the minds of the jury, that it did not arise from an accidental or innocent cause. Under the circumstances of the present case, there is no reason to suppose that the fire proceeded from an internal cause. In another part of the year, if the corn had been stacked in a damp state, or if there had been a storm accompanied with lightning, possibly a fire might have occurred from either of those causes; but considering that this fire took place in the depth of winter, and that the stack was in such a situation that no person passing along the road could, through carelessness or accident, communicate a fire to it, I think there was reasonable evidence from which the jury might presume that the fire was wilful and malicious. Then as to the objection in arrest of judgment, I find that a similar objection was taken and overruled in *Cook* v. *The Hundredors of Pimhill* (b). In that case, the allegation of notice was "to the inhabitants of the *parish*," and it was held, that though the act required the notice to be given to the inhabitants of the *town*, *village*, or *hamlet*, yet as the law primâ facie intends every parish to be a *vill*, unless the contrary be shewn, the allegation was sufficient after verdict, to sustain judgment for the plaintiff. That is an express authority against this motion.

(a) Hob. 139. Vide *Espinasse's Actions on Statutes*, 275, *et seq.*
(b) 8 East. 173. Vide *Com. Dig. tit. Parish*, (C. 1.) Co. Lit. 125.

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Bayley, J.—The position in which the property destroyed was, before the fire took place, must always be taken into consideration by the jury, in determining whether the fire is wilful and malicious, or accidental. The circumstances of this case were quite sufficient to warrant the finding of the jury.

Holroyd, J.—There was sufficient evidence from which the jury might reasonably draw the conclusion, that the fire was wilful and malicious.

Littledale, J. concurred.

Rule refused (a).

(a) See Salk. 501. Cro. Jac. 263. 274. 340. 2 Show. 233. and Doug. 681. 3.

The King *v.* The Aire and Calder Navigation.

Wednesday, May 12.

A poor rate, without giving a specification of the property for which the party is rated, is bad; therefore, where under the head "occupiers," the names only of the parties rated were given, with the rates and assessments opposite their names respectively: Held, insufficient.

UPON the hearing of an appeal at the Sessions for the West Riding of the county of *York*, of the undertakers of the *Aire* and *Calder* Navigation, against a rate or assessment made for the relief of the poor of the township of *Castleford* in the said Riding, bearing date the 11th *March* last, it was ordered that the said rate or assessment be confirmed, subject to the opinion of this Court, as to the following point. On the rate in question being produced, it appeared that, as far as it related to the appellants, it was as follows:

Rate.	*Rate.*			*Assessment.*		
	£.	s.	d.	£.	s.	d.
"The undertakers of the *Aire* and *Calder* Navigation, as occupiers of so much of the land which constitutes the bed of the river *Aire*, covered with water, as lies in the township of *Castleford* in the West Riding of the county of *York*; and also as occupiers of so much of the ground as is used for a towing path for the said river, and is within the said township."	156	5	0	15	12	6

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But with respect to all the other individuals charged thereby, it altogether omitted to state the property in respect of which they were rated. The first of these assessments was as follows:

Occupier.	*Rate.*	*Assessment.*
Ashton, Joseph -	£1 8 9 - -	0 2 10

And all the other assessments were exactly in a similar form. The appellant's counsel, upon this, objected that the rate ought to be quashed, inasmuch as this mode of assessment was insufficient, it not appearing by the rate in respect of what property the other individuals rated were assessed, and that the appellants were thereby prevented from instituting any comparison as to the relative value of that property by their own. This objection was specifically pointed out by the notice of appeal. The Sessions, however, overruled this preliminary objection, subject to the opinion of this Court (*a*).

Blackburne and *Bland*, in support of the order of Sessions. The objection to the form of this rate is untenable. [*Abbott*, C. J. Must not the rate specify the description of property in respect of which the occupier is rated; house or land, or something by which it may be ascertained whether he is properly rated?] The word "occupier" signifies, ex vi termini, real property. The rate shews that it must be real property for which the party is assessed, or it amounts at least to a sufficient general description of the property in respect of which the party is rated. A book is kept by the overseer of the poor, which is open to the inspection of every inhabitant, so as to enable him to ascertain for what his neighbours are rated, if any further information be desired. But sufficient appears here to

(*a*) There was another point reserved by the Sessions as to the rateability of the *Aire* and *Calder* navigation; but as the decision of the Court was founded upon the form of the rate, it is unnecessary to set out that part of the case.

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enable every person who is dissatisfied with the rate to appeal to the Sessions for any objection thereto. The statute 43 *Eliz.* c. 2. directs no particular form in which the occupier shall be rated. All that it directs is that the overseers "shall raise, weekly or otherwise, by taxation of every inhabitant, &c. and every occupier of lands, houses, &c. a convenient stock of flax, hemp, &c. to set the poor on work." In *Rex* v. *Brightman* (a) the word, "occupier" was held to imply real property; and therefore it should seem, according to that decision, that the word "occupier" imports not only a sufficient description of the person rated, but of the property in respect of which he is rated. In this particular township no difficulty whatever can arise, because the rate is made half yearly, and is subject to the investigation of the justices before it is allowed, and therefore the inhabitants have every means of knowing and judging whether the rate is properly estimated. [*Abbott*, C. J. The case does not state that the rate book is kept half yearly, or that it discloses every change of property which takes place in the township.—*Bayley*, J. For any thing that appears, this rate may be made upon a valuation of property taken twenty years ago.—*Abbott*, C.J. It is consistent with the statement in this case that the overseers of the township may be perpetual, and a perpetual overseer is not bound to shew the parish books. Every man has a right to know in what respect his neighbour is rated, for the purpose of ascertaining whether he himself is properly rated.] He may have a copy of the rate at a given price. [*Abbott*, C. J. Still a rate in this form would give him no information. In this rate *Joseph Ashton* is rated at so much as an occupier. Suppose he is under rated, what means have his neighbours of knowing whether he is rated for a dwelling house only, or for a dwelling house and field together? He may be rated for saleable underwood, for any thing we know. It is said that a book is kept, but unless the case shews the

(a) 8 Mod. 38. 3 Burr. 1062.

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existence of such a book, there is no authority to compel the inspection of it.] This form of rate prevails almost throughout the whole county of *York*, and has received the sanction of the magistrates, who are the most competent judges upon such subjects. If this Court should be of opinion that this is an improper form of rate, it will open a wide door to litigation and produce a vast number of appeals at the Sessions; for if there should be by any accident a misdescription of the property rated, it may be open to objection, and afford a ground of appeal. No act of parliament has provided in what form the rate shall be made, and therefore it must be left to the discretion of the justices. The last statute upon this subject only mentions the sum of money for which the party is to be rated, but makes no allusion to the form in which the rate is to be made. This is a mere technical objection, and ought not to prevail. [*Bayley*, J. I do not think it is a technical objection. The form in which this rate is made may mislead parties, and induce them to appeal, which they would not do if they knew the truth of the case, and were fully informed of the description of property rated. This rate gives no information to any body. I see *Joseph Ashton* rated at 1*l.* 8*s.* 9*d.* and assessed at 2*s.* 10*d.* This gives no information; it may be for a cottage and a close of land which he occupied last year; but until the appellant goes to the Sessions he cannot ascertain what the fact really is. If that information was given in the first instance he probably would not trouble himself with an appeal.] This rate is copied from the form given in *Burn*'s Justice, and has been filled up according to the directions there given. [*Abbott*, C. J. I have not the latest edition of *Burn*'s Justice, but in the edition published by Mr. *Chetwynd* in 1820 (*a*), it is said that the form of the rate may be to the following effect; and then there are columns headed in this manner, "Names of Occupiers," "Description of the Premises they hold," "Annual value," and "Sum assessed, six-pence the pound."]

(*a*) Vol. iv. p. 98.

Scarlett, *Tindal*, and *E. Alderson*, contrà, were not heard.

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Abbott, C. J.—I am of opinion, for the reasons already intimated, that the form of this rate is insufficient, and cannot be supported. I am sorry to hear that the practice of rating in this form prevails so generally in the county of *York*, because it is pregnant with a great deal of inconvenience, and must lead to great litigation. I have always conceived that every rate pointed out and specified the description of property rated, as it certainly ought to do. The order of Sessions must be quashed.

Bayley, J.—Many questions may arise from the manner in which the thing is specified, which is the subject of rate. For instance, in the case of tolls, the practice always has been to specify what description of tolls they are; as tolls of a lighthouse, and so forth. There can be no difficulty in specifying the nature of the property, and setting down the name of the occupier, and where he can be found. Nobody knows from this rate even where *Joseph Ashton* lives.

Holroyd, J.—The statute of *Elizabeth* does not impose a rate upon the occupiers of every description of real property, but only on particular descriptions, as "lands, houses, tithes impropriate, propriations of tithes, coal mines, or saleable underwoods." Now this rate only describes *Joseph Ashton* as an occupier. He may be the occupier of some species of real property which is not the subject of a poor rate. There are some species of mines which are not rateable, and he may be rated for property of that description. The objection is that he does not appear to be the occupier of any thing rateable under the statute of *Elizabeth*.

Order of Sessions quashed. (*a*)

(*a*) *Littledale*, J. was in the Bail Court.

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Wednesday, May 12th.

The KING *v.* The INHABITANTS of POLESWORTH.

Where a nephew hired himself to his uncle for three years, at one shilling per day, when he had work for him to do, and when he had not work for him, he was not to be paid, but was to be at liberty to get work from other people, and there was no proof of a service for the whole of any one year: Held, that no settlement was gained as a yearly hired servant.

TWO justices, by an order under their hands and seals, removed *Hannah Brindley*, single woman, from the parish of *Polesworth*, in the county of *Warwick*, to the parish of *St. Peter's, Derby*. The Sessions, on appeal, quashed the order, subject to the opinion of this Court upon the following case.

The pauper derived her settlement from her father, *William Brindley*, who, being legally settled in the appellant parish of *St. Peter's, Derby*, in *December*, 1784, agreed with one *William Bullers*, his uncle, then resident in the parish of *Polesworth*, to serve him for three years, at one shilling per day, when he had work for him to do, and when he had not work for him, he was not to be paid. *Bullers* told him, at the same time, that he should not have work for him all the year round, particularly in the winter, or, that when he had not work for him, he might get work from other people. After making the agreement, *William Brindley* went to work in the collieries until the *Spring* of the year 1785, and then went to work with his uncle, according to the agreement, and remained with him about nine months, when his uncle told him he had no employment for him, and he went and worked several weeks with a Mr. *Barrett*, of *Pooly Hall*, as a labouring man. After that interval, his uncle again having work for him, he returned to him, and worked for him about nine months longer, when he quitted him without his leave, and went to *Birmingham*, from whence he never returned to his service. He never received any wages from his uncle when he did no work for him, and never accounted with him for any wages he received from other people when absent from his service. The question for the opinion of the Court is, whether the pauper's father acquired a settlement in *Polesworth*, as a yearly hired servant.

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Reader, *Adams*, and *Balguy*, in support of the Order of Sessions. *William Brindley* acquired a settlement in *Polesworth*, by virtue of the hiring and service stated in the case. He was hired by the year, and he was substantially under the control of his master throughout the year. [*Bayley*, J. Did the mutual obligation of master and servant ever exist betwen the parties; or, was there at any time a hiring for any one year?] The parties clearly stood in the relative situation of master and servant, and the hiring, though for a space of three years, was evidently a yearly hiring. The nephew was legally bound to his uncle for a period of three successive years, and although he was absent for some short intervals, still he was, during the whole of two years, virtually serving his uncle under the agreement. Upon the authority of *Rex* v. *Martham* (*a*), this may be considered in the nature of a contract of apprenticeship for three years, and there it was held that the pauper gained a settlement by a hiring and service very similar to the present, although there were occasional suspensions of the service, and occasional deductions from the wages. But *Rex* v. *Chertsey* (*b*) seems to be precisely parallel in principle with the present case, for it was there held that an agreement by a daughter to live with her father, and to do the offices of a servant for a year, for her board and lodging and other perquisites, was a good hiring for a year, though the daughter was to be at liberty to earn what she could by her labour. *Rex* v. *Edgmond* (*c*) will probably be relied on by the other side, but that was decided against the settlement, upon the ground that there were express exceptions in the contract; in which respect, as well as in some others, it is materially distinguishable from this case.

Gouldburn, contrà, was stopt by the Court.

Abbott, C.J.—We must look at the agreement between

(*a*) 1 East, 239. (*b*) 2 T. R. 37. (*c*) 3 B. & A. 107.

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these parties as a whole, and doing so, it is quite evident that there was no hiring for a year, nor any service under a yearly hiring. The nephew contracted to serve his uncle when there was work for him to do, and the latter contracted to employ him and to pay him wages, when he had work for him to do. But there was an express exception mutually agreed upon, that when there was no work, there should be no service, and no payment of wages, which exception was acted upon for a period of three months in each of the two years. We are not to act upon implication, in the face of the terms of the contract. This case comes directly within the principle of *Rex* v. *Edgmond*, and other similar cases, and is mainly distinguishable from the other cases cited in argument. Upon the short ground I have already stated, I am clearly of opinion that *William Brindley* gained no settlement in the parish of *Polesworth*, and therefore that the Rule for quashing the Order of Sessions must be made absolute.

The other judges concurred.

Rule absolute. (a)

(a) Vide *Rex* v. *Gateshead*, ante, vol. iii. 333. note (b), and *Rex* v. *Althorne*, id. 375.

The King v. S. C. Marsh.

Wednesday, May 12th.

A conviction on the 5 *Ann.* c. 14. s. 2. against a common carrier, for having, in that capacity, game in his possession, need not negative the defendant's qualification to kill game; neither is it necessary to aver, that he has the game in his possession "knowingly."

CONVICTION by two Justices against the defendant as a common carrier, for having in that capacity pheasants and partridges in his possession, contrary to the statute 5 *Ann.* c. 14. The record of the conviction was to this effect:

"That on the 8th *November*, 1822, at *Mildenhall*, in the county of Suffolk, *E. Fowell*, of &c. came before Sir

H. E. B. Bt. and *R. E.* Esq. two of the Justices of our Lord the King, in and for the said county, and then and there gave them, the said Justices, to understand and be informed, that within three months last past, viz. on the 25th day of *August*, in the year aforesaid, at the parish of *Elden*, in the county aforesaid, *Samuel Clarke Marsh*, of the city of *Norwich*, and then and there being a common carrier, unlawfully had in his hands and custody and possession as such carrier, divers, to wit, twenty-two partridges and twenty-two pheasants of the game of *England*, such partridges and pheasants not having been sent up nor delivered or entrusted to the said *S. C. M.* as such carrier, as aforesaid, or any wise howsoever, by any person or persons in any manner qualified to kill game, contrary to the statute in such case made and provided. And the said *E. F.*, the said informer, prayed that the said *S. C. M.* might be convicted of the said offence above laid to his charge. Whereupon the said *S. C. M.* having been duly summoned in that behalf to answer the said premises before the said Justices afterwards, to wit, on the 14th day of *November*, in the year aforesaid, at *Mildenhall* aforesaid, in the county aforesaid, he, the said *S.C.M.*, appeared and was present before the said Justices in pursuance of such summons for that purpose issued, to answer to the said charge contained in the said information; and he, the said *S. C. M.*, having heard the same, was asked by the said Justices if he could say any thing for himself why he, the said *S. C. M.* should not be convicted of the premises above charged as aforesaid, who thereupon pleaded, that he was not guilty of the said offence. Nevertheless on the said 14th day of *November*, at &c. two credible witnesses, to wit, *J. F.* of &c. and *J. M.* of &c., came before the said Justices in their own proper persons, and before the said Justices the said *J. M.* and *J. F.* being respectively then and there, to wit, on &c., duly sworn, &c., the said Justices then and there having full power and authority to administer the said oaths to the said *J. M.* and *J. F.* in that behalf severally deposed, in the presence and hearing of the said

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S. C. M. concerning the premises in the said information specified, as follows, viz. First, the said *J. F.* deposed, &c. that he was turnpike gate-keeper at *Elden* aforesaid; that on the 25th day of *August* then last, and within three months last past, the said *S. C. M.* was, and is, a common carrier, and that the said *J. F.*, on the same day saw the waggon of the said *S. C. M.*, as such common carrier, stopped in the said parish of *Elden*, in the said county of *Suffolk;* that twenty-two live pheasants, two live partridges, and twenty dead ones were then in the said waggon, and in the possession of the said *S. C. M.* as such common carrier, as aforesaid. And the said *J. M.* deposed, &c. that he is keeper to *T. R.* Esq.; that he was present when the said *S. C. M.*'s said waggon was stopped as aforesaid, and that he searched it in consequence of a warrant from the mayor of *Thetford* and by the direction of Mr. *N.* a *Suffolk* magistrate, who was himself then and there present; that he found two hampers and a basket containing divers, to wit, twenty-two live pheasants, two live partridges, and twenty dead ones. Whereupon all and singular the matters and things in the said information and evidence contained being by the said *S. C. M.* then heard and fully understood, he, the said *S. C. M.*, was asked by the said Justices what he had to say and offer in his defence against the said information and offence, and in answer to the evidence given as above-mentioned, and what he had to say why he should not be convicted of the premises so charged upon him. And the said *S. C. M.* said, that the said partridges and pheasants, so alleged to be found in his said waggon, were put and remained there entirely without his knowledge and consent. And thereupon *J. C.* of *Thetford*, in &c., came before the said Justices on the same day and year aforesaid, at &c., in his own proper person, on the behalf of the said *S. C. M.*, and before the said Justices, being then and there duly sworn, &c., did depose before the said Justices, in the presence and hearing of the said *B. F.*, and of the said *S. C. M.*, concerning the premises in the said information speci-

fied as follows, viz. That he was in the employment of the said *S. C. M.* as book-keeper, at *Thetford*, on the 25th day of *August* last; that his said master's waggon stopped on that day at *Thetford* in its way to *London*; that he, the said *J. C.*, saw the waggon about six o'clock in the evening, and it stopped about an hour afterwards; that he saw nothing put into the said waggon except a hamper directed to the Rev. Mr. *B.* at *C.*, which he regularly entered and booked; that the said waggon had been in *Thetford* some time before he saw it, and that he did not know what might have been put into it, before he saw it; that *J. S.* was the driver of the said waggon who was accustomed to drive it; that he had not seen him since that time; that one *Evans* was with the said *J. S.* as helper; that he did not examine the said waggon, nor did he know what was in it; that he did not see any *Norwich* weigh-bill, nor was he accustomed to see one, unless any goods were left at *Thetford*; that the said *S. C. M.* lived at *Norwich*, which is his constant residence; that he never saw him at *Thetford* to see what was put into his waggon; and that it was impossible for the said *S. C. M.* if his waggoner or book-keeper put any thing into the said waggon at *Thetford* or on the road, for him to know of it except informed of it; that the said waggon came into *Thetford* considerably loaded, but that he, the said *J. C.*, did not know what was in it; that he was dismissed from his said master's service about a week from the 25th day of *August*, on account of the game found in the said waggon on the said 25th day of *August*, and he had not been since employed by the said *S. C. M.*; that he and his father had been book-keepers to the said *S. C. M.* for forty years before. And upon hearing and fully understanding all and every the matters and things by the said *S. C. M.* alleged and proved in his defence, touching the premises in the said information specified, inasmuch as the said *S. C. M.* hath not adduced any evidence of the said pheasants and partridges having been sent as aforesaid by any person or persons qualified by the laws of this realm to kill or destroy game, or to have

the said pheasants or partridges in his possession as aforesaid, it manifestly appeared to the said Justices that the said *S.C.M.* was guilty of the premises above charged upon him in the said information, it was therefore adjudged by the said Justices, upon the testimony of the said *J. F.* and *J. M.* credible witnesses as aforesaid, upon their several oaths before the said Justices taken as aforesaid, that the said *S. C. M.* on the 25th day of *August* in the year aforesaid, and within three months last past, at the parish of *Elden* aforesaid, in the county of *Suffolk* aforesaid, not being qualified as aforesaid, or in any manner so to do, but then and there, being a common carrier, unlawfully had in his custody and possession as such carrier, aforesaid, the said twenty-two pheasants and twenty-two partridges, the same pheasants and partridges, so in the hands of the said *S.C. M.*, not having been sent as aforesaid by any person or persons qualified to kill the game, contrary to the form of the statute in that case made and provided. And thereupon the said Justices, on &c. at &c. did convict the said *S. C. M.* of the offence aforesaid, in and by the said information charged against him, and the said *S.C. M.* was convicted thereof by the said Justices, upon the oaths of two credible witnesses, according to the form of the statute in that case made and provided, and the said Justices did adjudge that the said *S. C. M.* for his offence aforesaid, had forfeited the sum of £220 of lawful money of *Great Britain*, (that is to say,) the sum of 5*l*. for each of the said pheasants and partridges. And they did adjudge, that one-half of the said sum of £220 be paid to the said informer, the said *E. F.*, and the other half of the said sum of £220 be paid to the poor of the parish of *Elden* aforesaid, where the said offence was committed, according to the form of the statute in that case made and provided. In witness, &c. (*a*)

(*a*) This conviction had been settled by Counsel, in order to raise the questions for the opinion of the Court. When the conviction was drawn up originally, the Justices had omitted to set out the evidence for the defendant, whereupon in *Easter* Term last a mandamus was moved for to command them to set out the evidence on both sides, pursuant to

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Scarlett now moved to quash the conviction for two objections; first, that the information does not negative the defendant's being a person qualified to kill game; and second, that the information does not aver that the defendant had the game in his possession "knowingly." This being a summary proceeding, by which the defendant is to be convicted of a crime, the Court must not only be satisfied that the case is within the very words, but also within the scope and object of the statute. As to the first objection, it is clear, that if the defendant was a person qualified to kill game, his having the game in his possession, even though in the character of a carrier, would be no offence; and therefore it was necessary that the information should negative his qualification. In convictions upon the statute 5 *Ann.* c. 14. it is the invariable practice to negative the qualifications therein mentioned, and convictions have been frequently quashed for want of such negation. [*Littledale*, J. The only exception in the statute, as it respects carriers, is, "unless such game, in the hands of such carrier, be sent up by person or persons qualified to kill game."] That may be so: but still, if a carrier be qualified to kill game, he may send up the game killed by himself, in his own waggon, and therefore his qualification ought to have been negatived in the information. [*Abbott*, C. J. Then he would not have it in his possession, in his trade and business "*as carrier*."] At all events this objection is well worthy of consideration. Then, secondly, it ought to be shewn, affirmatively, that the defendant had this game in his possession "knowingly." A guilty knowledge is essential to constitute an offence within this statute. There is certainly nothing in the evidence set out, to shew that the defendant knew that the game was in his waggon, or that the circumstance ever came to his knowledge until after it was seized. Consistently with the

the directions of the statute 3 *Geo.* 4. c. 23. On serving the rule nisi for a mandamus, it was agreed between the parties that that proceeding should be abandoned upon a proper conviction being drawn up, to give the defendant an opportunity of taking the opinion of the Court as above-mentioned. Vide *In re Rix*, post.

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evidence it was put into the waggon by his servant without any privity whatever on his part. If that be so, then there is no offence committed, for the master is not answerable for the crime of his servant. Admitting that it may be difficult for the informer to prove knowledge, still it was incumbent on the Justices to state, as matter of averment, that the defendant had possession of the game knowingly.

Abbott, C. J.—I am of opinion, that, notwithstanding the objections urged, we ought to affirm this conviction. There are two objections taken to the form of the information: first, that it does not negative the defendant being a person qualified to kill game; and second, that it does not aver that he had the game in his possession knowingly. As to the first, I am clearly of opinion that it was quite unnecessary to negative in the information that the defendant was a qualified person; because whether qualified by law to kill game or not, if he had the game in his possession in the way of his trade or business *as a carrier*, he would undoubtedly come within the provisions of this act of parliament; for otherwise we must say that an unqualified carrier is liable, but a carrier who happens to be qualified to kill game is not liable to any penalty, although each does the very same thing. As to the second objection, I am also of opinion, that the information need not have charged the defendant with having the game in his possession as a carrier "knowingly." The language of the statute is, "if any higler, chapman, *carrier*, &c. shall have in his or their custody or possession any hare, pheasant, partridge, &c. he or they shall, upon conviction, forfeit, &c." The act does not say "if any carrier shall *knowingly* have;" but "if he shall have;" and we can very easily understand why the legislature did not use the word "knowingly;" because if they had, it would have the effect, in all cases, of casting the burthen on the prosecutors of proving that which would perhaps be incapable of proof, namely, that the master-carrier, who lived at one end of the journey, was privy to

every thing that passed on the road during the progress of the waggon to its destination. It would not be sufficient therefore for the carrier, in this particular instance, to say, "I did not know that the basket of game was put into my waggon; I know nothing about it." I agree that if the carrier could shew that the game had been put into the waggon without his privity, contrary to his orders, and in fraud of him by his servant, for the benefit of the servant only, it would be a valid defence; but that must come from the other side. The question then is, whether there is sufficient stated on the record to sustain this conviction. It is very properly urged, that we are to see whether the evidence adduced on the part of the prosecution shews a primâ facie case to charge the defendant; for if it does, then the burthen is cast upon the defendant to negative it. The effect of the evidence was for the consideration of the Justices, and not for our judgment. Now the evidence is, that in the course of a journey performed between *Norwich* and *London*, two hampers and a basket containing a considerable quantity of game are found in the defendant's waggon. That is primâ facie evidence that they are in his possession as a carrier, for they are in that carriage, by which his trade and business as a carrier is conducted. If then there was a primâ facie case thus made out, has it been rebutted sufficiently for us to say that the defendant was clearly entitled to an acquittal? I am not prepared to say that it was, nor am I at liberty to hold that the Justices have done wrong in the conclusion they have drawn from the evidence. But what does the defendant's case shew? It shews only that some person at *Thetford* did not see the game in the waggon when it stopped at that town. Where and when it was put in was not proved; and, for aught that appeared to the Justices upon the inquiry before them, these hampers and the basket might have been put into the carriage at *Norwich*, and entered in the weigh-bill with other goods, or put into the waggon at some intermediate town or place between *Norwich* and *London*. The defendant

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might have produced the weigh-bill to shew that the fact was not so, or he might have proved many more circumstances in his favor than he did. Not being able to shew that the game was put into the waggon contrary to his order, then that which I consider to be a primâ facie case was made out by the informer and left unanswered, namely, that he has in his carriage, in the progress of a journey, a quantity of game, which he must be presumed to have in his possession as a carrier, unless he shews the contrary. For these reasons I am of opinion that the conviction must be affirmed.

Bayley, J.—I am of the same opinion. The rule as to convictions is this; the information must bring the case within the words of the clause which imposes the penalty, and must negative any qualification, if there be any; but, generally speaking, it is sufficient to charge the offence in the language in which the legislature has prohibited it. Now trying this conviction by that rule, it is clearly not necessary to negative a carrier's qualification to kill game, nor to allege knowledge, if game is found in his possession. The words of the statute are, "if any carrier shall have in his possession, &c."; not "if any *unqualified* carrier"; and when the charge is in carrying game from an unqualified person to a given place, the mischief is exactly the same whether the carrier is qualified or unqualified, and therefore there can be no reason for the distinction between a qualified and unqualified carrier. Then as to the averment of knowledge, the clause itself says nothing as to knowledge. If the word "knowingly" had been introduced into the clause, undoubtedly knowledge must have been averred in the information, and some evidence must have been given on the part of the informer to shew the act complained of was committed with the defendant's privity. But in this case I do not think that either such averment or evidence was necessary. It was quite enough for the informer to prove that the defendant, being a carrier, had, in the lan-

guage of the act, "in his custody or possession," the things prohibited. After such proof it was for the defendant to shew such a degree of ignorance as would excuse him; but that must come by way of defence on his part. It was clearly proved that the game in question was found in the waggon of the defendant. That is primâ facie evidence that they were in his custody or possession in his character of carrier. It establishes a primâ facie case to be rebutted by the defendant; and in considering how it is to be rebutted we are to attend to the species of evidence which would have been admissible, provided he was really innocent. He only calls one witness from *Thetford*, who says that the waggon came loaded to that place. What it contained he does not know. Then, as far as we can judge, the waggon might at that time have contained the hampers in question. Why then they might have been put in with the knowledge or the authority of the defendant, or they might have been wrongfully put in by his servants without his knowledge. If the latter was the fact, could he not have called somebody from *Norwich* to shew how the waggon was loaded at that place, and satisfy the justices, if he could, that he had been imposed on, and that he was ignorant of any such hampers having been put into the waggon? The weigh-bill would have been a material piece of evidence, but that was not produced. There may be some cases in which the fraud of the waggoner in taking up articles of this description without his master's knowledge would be a protection to the latter, provided it could be made out to the satisfaction of the magistrates. Here the defendant gave no evidence to rebut the primâ facie case made out against him, and the magistrates have, in my opinion, drawn the right conclusion.

LITTLEDALE, J. (a)—I am also of opinion that it was not necessary to negative the defendant's qualification.

(a) *Holroyd*, J. was gone to chambers.

The second clause of the 5 *Ann.* c. 14. on which the conviction is founded, contains no other exception than this, namely, "unless such game in the hands of such carrier be sent up by person or persons qualified to kill the game." Now this exception is negatived in this conviction. The introduction of that particular exception into the clause shews clearly that whether the carrier be qualified or not to kill the game, still if he has game in his possession, quà carrier, he is liable to the penalty, unless he can shew an innocent possession. This clause is not framed like the 5th, which is directed against unqualified persons using dogs or guns to destroy game, in which case it is necessary to negative the qualification in the conviction. Then as to the averment of knowledge: in the first place, I doubt very much whether, upon the general merits of the case, the defendant's knowing or not knowing that the game was in his waggon (except under particular circumstances) would be any defence whatever. I take it to be a general rule that where a thing is done by a man's servant for the benefit of the master, the master is liable for what is done. He is answerable for the publication of a libel by his servant; for a nuisance committed by his servant in the regular course of his employment; and for the sale of things by his servant which ought to have a stamp, though he has no knowledge of the act done. Perhaps, indeed, if it had been distinctly proved in this case that the master had given directions to his servant to be particularly cautious not to take any game into the waggon, a question might arise whether the master would be criminally answerable or not, if the servant had violated his orders. But at all events, the finding the game in his waggon is primâ facie evidence that he knew it was there. I think, however, in the second place, that it was not necessary to introduce the word "knowingly" into the information, inasmuch as that word is not to be found in that section of the statute upon which the conviction has taken place; and as a general rule, both as to indictments and declarations, it is sufficient to pursue the

words of the statute. The words of this statute have been pursued, and that is enough.

Conviction affirmed (*a*).

Nolan and *Chitty* were to have argued in support of the conviction.

(*a*) Vide *Rex* v. *Stone*, 1 East, 639. *Rex* v. *Turner*, 5 M. & S. 206. 1 T. R. 144. and 1 B. & P. 468.

Guthrie v. Ford.

Thursday, May 13.

A prisoner under criminal process in the House of Correction cannot be brought up by Habeas Corpus, for the purpose of being charged in the custody of the Marshal upon a bailable writ, and recommitted to his former custody so charged.

THE defendant in this case being confined in the *Middlesex* House of Correction, upon a criminal charge, *F. Pollock*, on a former day, obtained a Habeas Corpus to bring him up for the purpose of being charged in custody of the Marshal in this action, and then recommitted to his former custody. The defendant was now brought up accordingly, by the Keeper of the House of Correction, but

The *Court* doubted its authority to grant the motion, and thought that the writ of Habeas Corpus had issued improvidently.

Pollock said, that the Court had lately done the same thing under nearly similar circumstances. *Morland* v. *Weston* (*a*).

Per Curiam. If so, the matter must have passed sub silentio, and without the attention of the Court being called to it. In *Brandon* v. *Davis* (*b*) it was held, that a prisoner under a criminal process in the House of Correction, cannot be brought up by a Habeas Corpus ad respondendum for the purpose of being charged with a declaration on a bailable writ, and recommitted to his former custody so charged.

(*a*) Ante, vol. iii. 31.

(*b*) 9 East, 154.

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In that case, Lord *Ellenborough* said, "The consequence of charging this party with a declaration, will be to make the gaoler of the House of Correction liable to the plaintiffs in case of an escape; but the Master has mentioned a case to us, where the Court, in Lord *Mansfield's* time, refused an application of this sort, to bring up a person in the custody of the keeper of *Bridewell*; saying, that this Court had no power to make a gaoler of such prisons, liable for the escape of a prisoner in civil process. The only inconvenience from the law as it stands is, that during a prisoner's confinement in these cases, he cannot be sued, when probably a plaintiff could derive no benefit from his suit; and a plaintiff may prevent the statute of limitations running upon his demand, by suing out his writ and entering continuances." This case is expressly in point, and therefore we have no authority to grant the motion.

The defendant was then remanded to his former custody.

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KENNARD *v.* HARRIS.

Where by the terms of an order of Nisi Prius referring matters in dispute to the award of an arbitrator, on the terms of the defendant paying the costs of the cause, and of the reference and award, and the plaintiff, after having accepted the costs of the reference and of the award, was dissatisfied with the award: Held, that he was precluded from impeaching it.

TRESPASS for entering plaintiff's pond. At the trial before *Burrough*, J. at the last *Summer* Assizes for the county of *Devon*, it was agreed between the parties, that a verdict should be entered for the plaintiff, on certain issues upon the record, with one shilling damages, and that it should be referred to an arbitrator to say, how the water of the pond in question should be used in future; the defendant undertaking to pay the general costs of the cause, as if all the issues had been found against him, and also to pay the costs of the reference and award. An order of Nisi Prius was drawn up upon these terms, and the arbitrator having proceeded in the reference, made an award directing in what manner the water should be used in future. After

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the award was made, the defendant paid the plaintiff, and the plaintiff accepted the costs of the cause, and of the reference and award.

E. Lawes having obtained a Rule Nisi for setting aside the award, on several grounds, mentioned in the rule,

Gaselee now shewed cause, and contended that, after the plaintiff had accepted the costs of the reference and the award, he was concluded, and was not at liberty to disturb the award.

The whole COURT was of this opinion, and said, that, by accepting the costs of the reference and award, the plaintiff had precluded himself from moving to set aside the award.

Rule discharged.

The KING v. The COUNTY CLERK of MIDDLESEX.

Thursday, May 13.

The County Clerk of *Middlesex* is entitled to take the following fees upon the hearing and determination of suits in his Court; viz. upon the appearance of both parties upon the first summons and determination of the cause, 3*s.* 6*d.*: upon an order nisi in consequence of the non-appearance of the defendant upon the first summons, 2*s.*; and upon execution on a judgment against the defendant, 3*s.* 4*d.*; which sums include the fees to the county clerk, bailiffs, and criers.

ON a former day a rule was obtained, calling on the County Clerk of *Middlesex* to shew cause why an information should not be filed against him for alleged misconduct in his office. It was alleged, among other matters, that he had exacted greater fees, in a cause in which *Joseph Brock* was the plaintiff, and *James Hulme* was the defendant, than are authorized by the statute 23 *Geo.* 2. c. 33. the defendant in that case having been charged 8*s.* 10*d.* for his costs of suit, contrary to the said act. Cause was now shewn against the rule upon affidavits of considerable length, in which the alleged misconduct of the County Clerk was completely negatived; and as to that part of the case which imputed the exaction of illegal fees, the practice of the County Court, from the year 1772 down to the present time, was stated to

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be this:—The plaint being entered, a warrant is issued, upon which the defendant is summoned to appear on a given day. If the plaintiff and defendant both appear on being called on the day appointed, the defendant's appearance is entered, the cause is heard, and an order made and entered according to the verdict; and the whole cost of a suit thus terminated amounts to 3*s.* 6*d.*, including county clerk's, bailiff's, and crier's fees. But if the defendant does not appear on being called, the plaintiff is heard as to the amount claimed, and an order nisi is made and entered for judgment on a future day. This order nisi is served on the defendant, and if he appears on the second day appointed, the case is heard as before, and an order absolute is made according to the verdict. The whole cost of the suit in the last-mentioned case amounts to 5*s.* 6*d.*; and if the defendant does not appear on the second day, an order absolute is made, and entered for judgment by default; and the whole cost in that case is 5*s.* 4*d.*: such costs in each of the two last-mentioned cases including the fees of the county clerk, bailiffs, and criers. But the cost occasioned by the defendant not appearing on the summons, amounting to 2*s.* or 2*s.* 2*d.* according to criers, is always paid and borne by the defendant, as being his default; and if the debt and costs are not paid on the day or days specified in the said orders absolute, the plaintiff has a right, at any time within a year, to demand an execution against the defendant, the cost of which is 3*s.* 4*d.*, that is to say, 4*d.* to the county clerk, for the execution, and 3*s.* to the bailiff executing the same. In the present case the defendant had been summoned for a debt under 40*s.*, but not appearing on the day appointed, an order nisi was made upon him to attend the Court on a second day, when he attended accordingly, and the cause being heard, a verdict was found by the jury against him, and execution awarded for the debt and costs, the amount of the latter being 8*s.* 10*d.* which sum was composed of the following items, 3*s.* 6*d.* for the order, 2*s.* for the order nisi, and 3*s.* 4*d.* for the execution, according to the practice of

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the court as above set forth. The county clerk stated in his affidavit that previously to his appointment to the said office, one *Peter Hardy*, together with certain other freeholders of the county of *Middlesex*, presented a petition to the Lord High Chancellor in pursuance of the power given by section 16 of 23 *Geo*. 3. c. 33. complaining of the then practice of the Court, and that other or greater fees were exacted by the then county clerk than the said act allowed; that the said petitioners then proceeded in their said petition to state the practice of the court, as it now exists, and as is above set forth, and the fees taken for each particular proceeding in the Court, which fees so set forth and complained of, were in every respect the same fees as are now taken by the present county clerk; that the matter of the said petition had been fully heard before Lord *Ellenborough*, C. J. and *Gibbs*, C. J. and after hearing all parties, they adjudged as follows:—"We have considered the within petition, together with the affidavit of the within-mentioned *Peter Hardy* and *Thomas Leach*, and the papers thereto annexed, and have been attended by the respective attornies of the said *P. H.* and of the said *T. L.* and we are of opinion that the fees which are stated to have been received by the said *Thomas Leach* and the other officers of the said County Court for *Middlesex*, held under the 23 *Geo*. 2. c. 33. are justified by a fair construction of that act; and we are also of opinion, that upon the facts submitted to us, and upon our view of the said act of parliament, there is no ground for criminating the said *Thomas Leach* in respect of any thing which appears to have been done by him in the execution of his office of County Clerk; but we think that the warrant, in obedience to which the summons in each case is stated to issue, and which we consider to be analogous to the Sheriff's precept to his bailiff for the summons in the old County Court, ought, in point of fact, to have issued, and should issue hereafter in each case as an authority to the bailiff for the summons."

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The COURT, after hearing the facts and circumstances disclosed on affidavit on both sides, were clearly of opinion that there was no pretence for granting an information on the ground of misconduct on the part of the County Clerk in his office; and with respect to the alleged exaction of excessive fees, they observed that the determination of Lord *Ellenborough*, C. J. and *Gibbs*, C. J. as to the practice of taking fees, was conclusive upon the subject, and afforded a complete answer to the complaints now alleged, inasmuch as the fees demanded were in this instance similar in amount to those which had received the sanction of those learned Judges.

The Rule was therefore discharged with costs.

French was for the prosecution, and *Scarlett* and *Brodrick* for the defendant.

The KING v. The INHABITANTS of NORTHWEALD BASSETT.

Saturday, May 15.

Where a widow was entitled to dower [which was *unassigned*] upon her husband's estate which had been mortgaged by him for a thousand years, and after receiving her dower upon one half-year's rent from the mortgagee in possession, she became chargeable to the parish, in which the property was situated before she had resided forty days: *Held*, that as the dower had not been assigned, she had not such an interest in the parish as to render her irremoveable from what could be called *her own*.

BY an order of two Justices *Melicent Reynolds*, widow, and her six children, were removed from the parish of *Northweald Bassett* to the parish of *Magdalen Laver*, both in the same county. The Sessions, on appeal, quashed the order, subject to the opinion of this Court, on the following case:

Richard Reynolds, the husband of the pauper *Melicent Reynolds*, died in *May*, 1822, seised of a freehold estate liable to dower in *Northweald Bassett*. Dower was not barred, but it has not been assigned, nor have any steps been taken for that purpose. The heir at law has been from the time of his birth an idiot, and at *Richard Rey-*

nolds's death was about twenty-one years of age. This estate had been devised to *Richard Reynolds* by his mother, who died more than twenty years ago, and who by her will left several legacies, but it did not appear in evidence whether those legacies had been satisfied or not. In the year 1820, long after the marriage of *Richard* and *Melicent*, the estate had been mortgaged for a term of one thousand years by *Richard* to secure the payment of 100*l.* The mortgagee has received the half-year's rent which accrued since the death of *Richard* at *Michaelmas* last, out of which he paid the sum of 3*l.* to the pauper *Melicent*, and took from her the following receipt:

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"The 7th *December*, 1822. Received of the heir-at-law of my late husband *Richard Reynolds*, deceased, the sum of three pounds by the payment of *Richard Houchin* the tenant, being my third share (as his widow) of the half-year's rent of the freehold part of his estate on *Thornwood* Common in *Northweald Bassett*, due *Michaelmas* last."

	£.	s.	d.
"The half-year's rent	11	10	0
"The half-year's interest on mortgage . .	2	10	0
	9	0	0
"Mrs. Reynolds's third	3	0	0

The Mark of
✕
Melicent Reynolds."

Richard Reynolds lived in *Magdalen Laver*. After his death, his widow, the pauper, resided in that parish for some months, and then hired and lived in a cottage in *Northweald Bassett* which was not on the husband's estate. Before a residence of forty days had been completed in that parish she became chargeable, and was removed by an order of Justices. The Sessions were of opinion that she was irremoveable and quashed the order. The question for the opinion of the Court is, whether the pauper was removeable from *Northweald Bassett*?

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Brodrick and *H. I. Stephen* in support of the order of Sessions. The pauper's right to dower, although unassigned, gave her such an interest in land in the parish of *Northweald Bassett*, as rendered her irremoveable, notwithstanding she had not completed her residence for forty days at the time she became chargeable. According to Lord *Ellenborough's* language in *Rex* v. *Horsley*(a), "she had at least so much colour of right to reside in the parish, without being removed, as to exempt her residence from being considered as a vagrant intrusion into a parish in which the party has nothing of *her own* within the purview and scope of the poor laws." It is not necessary to contend, that if the pauper had resided forty days she would have gained a settlement in *Northweald Bassett;* it is sufficient to shew that she had at all events such an interest in the parish as took away the power of the Justices to remove her under the stat. 13 and 14 *Car.* 2. c. 12. She was clearly not of that description of vagrant intruders against whom that statute was directed. The case of *Rex* v. *Horsley*, already cited, is a strong authority in support of this argument. In that case it was decided, after solemn deliberation, that a *sole* next of kin has such an equitable interest in a leasehold tenement of the intestate, that she gains a settlement by residing forty days in the same parish after the intestate's death, before administration granted to her; and it matters not that the widow of the intestate survived him, if she died afterwards without having taken out administration, leaving the other, sole next of kin to the intestate. There is no doubt in the present case that the pauper is entitled to dower, and though it may not have been formally assigned, yet that circumstance will make no difference as it respects the present argument. Here there has been a bonâ fide payment of £3 to her, and she has had the actual enjoyment of it, and consequently had such an interest as entitled her to remain in the parish. This case is perfectly distinguishable from

(a) 3 East, 405.

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Rex v. *Berkswell* (*a*), where the pauper had no right whatever to reside, being merely an intruder in point of law, and consequently could gain no settlement by a residence of forty days. It is unnecessary to cite cases to show that the party need not reside upon the property in respect of which the interest arises; so long as the residence is in the same parish. *Rex* v. *Sowton* (*b*), *Rex* v. *St. Nyotts* (*c*), are authorities to that effect. The case which will be relied upon on the other side is *Rex* v. *Painswick* (*d*), in which it was decided, that although a mere right of dower without an assignment will gain a widow a settlement by a residence of forty days, yet it is not that sort of interest which will communicate itself to a second husband, and confer a settlement upon him and the children of the second marriage, because a tenant in dower has no right to *enter* till dower is assigned. But the main reason for the decision of the court in that case was, that the mere right of dower was not like the case of a next of kin, "who cannot acquire a settlement *before* administration granted." Now the Court will observe what the state of the law was when that decision took place. At that time no case had decided that a sole next of kin was irremoveable before administration granted; but since then *Rex* v. *Horsley* has expressly determined the affirmative of that proposition. As the whole foundation then of *Rex* v. *Painswick* was the supposition already alluded to, it follows that if a sole next of kin is irremoveable, so is a dowress whose dower is unassigned. [Bayley, J.—Suppose the pauper in this instance could gain a settlement by a residence of forty days, if the parish officers had allowed her to reside so long, had they not a right to remove her, if chargeable in the mean time?] Certainly not, upon the principle that she was not removeable from her own. *Rex* v. *Horsley*, it is submitted, makes out that proposition, and shews that *Rex* v. *Painswick* is not to be considered as an autho-

(*a*) *Ante*, vol. iii. 9.
(*b*) 1 Burr. S. C. 125.
(*c*) 1 Burr. S. C. 182.
(*d*) Id. 783.

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rity governing the present question. The reason why a tenant in dower has no right to enter until dower is assigned, is founded upon public convenience, which will not allow a widow to carve for herself; and in all the cases upon this subject, it is said, that without assignment she would be a trespasser if she entered. *Bac. Ab. tit. Dower*, [D]. Still, however, her right to dower may be perfect without assignment, which is a mere form which the law has prescribed to consummate her title. In the *Duke of Hamilton* v. *Lord Mohun* (a), it is said, "As to the want of a formal assignment of dower, that is nothing in equity; for still the right in conscience is the same; and if the heir brings a bill against the mother for an account of profits, it is most just that a Court of Equity should, in the account, allow a third of the profits for the right of dower." The statutes 18 Geo. 2. c. 18. s. 5. and 20 Geo. 3. c. 17. s. 12. which relate to the right of voting at elections, treat the assignment of dower as a mere ceremony. But it may be contended in this case, that in point of fact there has been a valid assignment of dower to this pauper. According to the facts stated in the case, the husband mortgages the estate for a term of 1,000 years, to secure the repayment of 100*l.* subject to the remote and almost nominal reversionary interest of the heir, who is an idiot, and who consequently cannot execute an assignment. The mortgagee is the person in whom the whole present interest is vested, and he pays a certain sum of money to the widow as her dower, and which sum is accepted by her as such. [*Abbott*, C. J. How could his payments of the dower prejudice the rights of the heir?] In *Co. Lit.* 34 b. it is laid down, first, that dower may be assigned by the tenant by consent and agreement; second, that an assignment of dower requires neither livery of seisin, nor writing, but may be by parol, because it is due by common right; and third, that it may be by a rent issuing out of the land as well as by parcelling out the land by metes and bounds. [*Abbott*,

(a) 1 P. Wms. 122.

C. J. Here there is no tenant of the land. A mortgagee in fee would be tenant of the land, but here there is no such tenant.] Conceding that there was no good assignment of dower in this case, still the pauper's right to dower gives her such an interest in this parish, as renders her irremoveable, and therefore the order of Sessions must be affirmed.

Marryat (with whom was *Jessopp* and *Knox*) contrà.—It is perfectly clear that there was no assignment of dower in this case, and therefore, dower unassigned, is not such an estate as will either confer a settlement, or prevent the pauper from being removed. Undoubtedly a person may be irremoveable without having acquired settlement, but that is upon the principle that the party is irremoveable "from *his own*." That is the language of the law in a numerous class of cases. The case of *Rex* v. *Horsley* does not vary the proposition, because there the party had a right to the property as sole next of kin, and had by statute the entire equitable interest until administration was taken out, and nobody else could have taken out administration without her concurrence. In all the decisions upon the head of settlement by estate, the pauper must have the *right of possession*. That was the very principle upon which *Rex* v. *Berkswell*, cited on the other side, was decided. In the present case, the pauper had no legal right of possession until there was a valid assignment of her dower, and if she attempted to enter, she would be a trespasser. The legal title to the freehold was in the heir, who alone had the right of possession, subject to the widow's dower, which may be assigned either by himself, by the sheriff, or by any of the other modes prescribed by law. The answer to the argument on the other side is, that here the pauper had nothing *of her own*, from which it can be said she was irremoveable. *Rex* v. *Painswick* is a decisive authority to shew, that without an assignment of dower, the widow had no estate in the land which can be called her own.

Here the Court stopped him.

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Abbott, C. J.—As it is agreed on both sides, that there was in fact no assignment of dower, I am clearly of opinion that the pauper in this case had not any such interest as would entitle her to the possession of any part of the estate as her own, so as to render her irremoveable. *Rex* v. *Painswick* seems to be a decisive authority; and as that case has never been impeached by any subsequent decision, I think we are bound by it, and consequently the order of Sessions must be quashed.

Bayley, J.—There being an express decision on the point, unless we could see that that decision was wrong, we ought to abide by it. The *King v. Painswick* is, I think, a decisive authority upon this question. Here the pauper would never have a right of occupation; for so long as the thousand years term continued, the right of occupation would be in the termor, and whatever right she might have, could only be by assignment, which in fact has never taken place. In *Rex v. Painswick* the widow, after her husband's death, continued residing on the property, and there was a clear possession for forty days. The Court there decided, that, inasmuch as it was a legal right of possession in her, under the statute of *Magna Charta*, by which the widow would be irremoveable for forty days, she might therefore gain a settlement. She afterwards continued to reside upon the property, and she married again, and she and her second husband lived upon it for about two years. Now if the right of dower unassigned would confer a settlement on the party who was residing upon the estate out of which the dower was to issue, the husband would have been irremoveable during the whole of that time. The question in that case was, whether the children of the second marriage were settled in the parish in which the mother and father had so resided; and the Court held that they were not. Why? Because the right to have dower assigned, and residing upon the estate on which the mother was entitled to have dower assigned, was not sufficient to communicate a settlement to

the husband and the children, the dower not having been, in point of fact, actually assigned. That case is precisely like this in principle, and we ought to be bound by it.

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Holroyd, J.—I think the decision in *Rex* v. *Painswick* is decisive of the present case, unless we could see that it was determined upon a wrong principle. We should not be authorized in disturbing it, unless there was reason to doubt the propriety of it. I see no reason for saying that it is wrongly decided, and therefore on the authority of that case I am of opinion that we ought to quash this order.

Littledale, J. was in the Bail Court.

Order of Sessions quashed.

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Tuesday, May 18.

Where the mayor of an ancient borough, in which he was also a justice of the peace, took a fee of 4*s.* from a publican resident within the borough, for renewing his annual license, and though it appeared that for fifty-seven years a similar fee had been uniformly received by the mayor for the time being, from every publican within the borough applying to have his license: Held, that such fee was illegal, and might be recovered back in assumpsit for money had and received, without notice of action.

Assumpsit for money had and received by the defendant to the use of the plaintiff. Plea non assumpsit, and issue thereon. At the trial, before *Garrow*, B. at the *Norfolk Lent* Assizes, 1823, the plaintiff had a verdict, subject to the opinion of the Court, upon the following case:

The plaintiff is a publican, in the borough of *Great Yarmouth*, where he resided and carried on business in the year 1822, during which year the defendant was mayor of the borough. In the month of *September*, 1822, a meeting was duly held by the defendant, who, in his character of mayor, was then one of the justices of the peace in and for the borough, and by another justice of the peace in and for the borough, for the purpose of renewing the annual licenses of the publicans in the borough. The plaintiff attended at that meeting, in order to renew his license, and the clerk to the said justices, who is also town clerk and

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clerk of the peace for the borough, on granting to the plaintiff his license, demanded a sum of 12*s.* 6*d.* which the plaintiff accordingly paid. The clerk then paid over to the defendant a sum of 4*s.*, part of the said sum of 12*s.* 6*d.*, which he had received on the account and by the authority of the defendant as mayor. He also paid over the sum of 2*s.*, other part of the said sum of 12*s.* 6*d.*, to the serjeants at mace, and retained the sums of [illegible]*s.* 6*d.* as clerk to the justices, and 2*s.* as clerk of the peace, the residue thereof, to his own use. *Great Yarmouth* is an ancient and immemorial borough. Until the reign of Queen *Ann*, the chief officers of the corporation were two bailiffs. Various charters, from the reign of King *John* to that of Queen *Ann*, granted to the bailiffs all ancient and usual perquisites, fines, emoluments and profits, which they had before by pretext of any incorporation, or by reason or pretence of any prescription, use, or custom, held, enjoyed, or used. By an act 1 *Ann.* st. 2 c. 7. it was enacted, that when the style of the corporation should be changed from that of bailiffs, aldermen, burgesses and commonalty, to that of mayor, aldermen, burgesses and commonalty, the mayor and his successors should have and enjoy all the same fees, perquisites, privileges and jurisdictions, as the bailiffs had before lawfully claimed and demanded. By a charter in the following year, the style of the corporation was changed, and it was thereby provided, that the first mayor therein named and his successors, should have and enjoy the same powers, privileges, fees, perquisites and profits, as the bailiffs in any manner had before held and enjoyed, within the liberties and precincts of the said borough. No entries were made of the sums paid for licenses in the books of the corporation, but as far back as living memory went, that is to say, from the year 1765, up to the time of bringing this action, the same sum of 4*s.* had been uniformly received by the mayor for the time being, from every publican applying for a license, as his usual and accustomed fee for granting it. No notice of the action was given previously to its commencement.

Rolfe, for the plaintiff. There are three questions in this case. First, Whether the defendant was entitled, under the 24 *G*. 2. c. 44. s. 1. as a justice of peace, to a month's notice of action, previous to the suing out of the writ. Second, Whether the defendant was justified, either by any statute-law, or prescription, in demanding and receiving from the plaintiff the sum of 4*s*. previous to granting him a license. And third, Whether the plaintiff, having paid that money, can recover it back, in an action for money had and received. For the plaintiff, it is submitted, that the Court must answer the first two of these questions in the negative, and the third in the affirmative; the second, however, seems to be the most important, and may with most advantage be argued first in order. The first statute which regulated the sale of beer in alehouses, by means of licensing the proprietors, was the 5 & 6 E. 6. c. 25. which recites that "intolerable hurts and troubles to the commonwealth of this realm doth daily grow and increase, through such abuses and disorders as are had and used in common alehouses, and other houses called tippling-houses," and enacts that no person shall in future sell ale or beer without a license, to be granted by the Sessions, or by two justices of the peace; and that every person so licensed, shall be bound by recognizance for the proper conduct of his house, "for making of every which recognizance, the party so bound shall pay but twelve-pence." There are many subsequent acts of parliament upon the same subject, but the only one which it is material to notice, is the 3 *G*. 4. c. 77. s. 5. which provides that for filling up the license, and for taking and returning the recognizance to be entered into, the sum of five shillings, and no more, shall be taken by the justice's clerk, over and above the fees to be paid to the several clerks of the peace for filing the recognizances. If, therefore, the defendant was entitled to exact from the plaintiff the sum of 4*s*. upon granting him a license, it is clear that he cannot derive his title from the statute book, and it remains to be seen, whether by the prescription in

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this borough, and the custom which is said to have obtained there previously to the 1 *Ann.* st. 2. c. 7. he is in a better situation. By that act the mayor is empowered to have the same fees as the *bailiffs had before lawfully claimed and demanded. Now the fee which had before been lawfully claimed and demanded for granting a license, must have been "but twelve-pence;" and that, therefore, was the only fee which the defendant was entitled to have, unless he can shew an immemorial usage in the borough for taking a fee of 4*s.*, which certainly he cannot. It will, perhaps, be said, that this fee was taken, not in respect of the license, but on some other ground. Unless, however, some other justifiable cause for the exaction is plainly shewn to the Court, they will not presume it: none such is suggested in the case, and it is difficult to imagine that any such can really have existed. Then shortly, with respect to the first point: It has been decided in *Umphelby* v. *M'Lean* (*a*), that in an action for money had and received, brought against collectors for excessive charges on a distress for arrears of taxes, the defendants were not entitled to a month's notice under the 43 *G.* 3. c. 92. s. 70; which is in effect deciding the present case, because the two statutes have the same object, are founded upon the same principle, and are couched nearly in the same terms. Besides which, it is quite evident from the tenor of the 24 *G.* 2. c. 44. s. 1. that it was not designed to apply to an action in this form, brought to recover money paid under circumstances like the present. Thirdly, the plaintiff may recover this money in the present form of action. The argument contrà will be, that he has paid the money in his own wrong, and therefore that the action cannot be maintained. That rule must be admitted to prevail in some instances, but it does not apply here; because the plaintiff paid the money under a species of duress, and therefore it was not a payment in his own wrong. If he *had not paid the money he could not have obtained the license, without which, either he could not have carried

(*a*) 1 B. & A. 42.

on his trade, and must have been reduced to ruin, or he must have continued to carry it on against the law, and under the peril of heavy penalties for so doing. It was therefore "a payment by compulsion," within the rule laid down by the court in *Astley* v. *Reynolds* (*a*); and may be recovered in an action of assumpsit. [*Abbott*, C. J. There the money was paid under a protest.] So it virtually was here; but that is immaterial, for in *Dew* v. *Parsons* (*b*), it was held, that an attorney might maintain money had and received against a sheriff for the excess paid above the legal fee for issuing a warrant, and there the money had been paid without any objection or protest whatever. In addition, one great and general argument is important to the decision of this case, namely, that it is against public policy, and a violation of public justice, that a person in the situation of the defendant should receive any fee for performing his duty; it was corruption and extortion in him to take it, and it was an infringement of the rights of the plaintiff, that he should be compelled either to pay it, or to lose the license to which he was entitled, and which was essential to the carrying on his business, and to his support in life. On all these grounds, therefore, it is clear that the plaintiff is entitled to the judgment of the Court.

Dover, contrà. If the defendant received the money in his character of a justice of peace, it is quite clear that he was entitled to notice of action; and if it is doubtful in what character he received it, still his right to notice is unimpaired, because, as the words of the statute are general, it will be presumed that he acted as a justice. *Biggs* v. *Evelyn* (*c*). The case of *Umphelby* v. *M'Lean* (*d*), is very distinguishable from the present; it was decided upon a different statute, and has no bearing upon that now under consideration. But *Greenway* v. *Hurd* (*e*) is directly in

(*a*) 2 Str. 915.
(*b*) 2 B. & A. 562.
(*c*) 2 H. Bl. 114.
(*d*) 1 B. & A. 42.
(*e*) 4 T. R. 553. See *Prestidge* v. *Woodman*, ante, vol. ii. 43.—*Bird* v. *Constable*, (n) Id. 45.

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point; for there the objection was founded upon the 23 G. 3. c. 70. s. 30. which is worded precisely the same as the 24 G. 2. c. 44. s. 1. and it was there held, that an excise officer, who had received duties not legally payable, was entitled to notice of action. [*Bayley*, J. But there he received the money bonâ fide, believing that it was legally due, and he proved the honesty of his intention by paying the money over to his superior. That was the ground of the decision there.] The general principle laid down in that case was, that wherever the officer acts colore officii he is entitled to notice, and certainly the present defendant must be considered as acting colore officii. [*Holroyd*, J. I think not. The claim set up by the defendant was not made in execution of his office as a justice; in *Greenway* v. *Hurd* it was; that makes a vital distinction between the two cases.] That distinction undoubtedly was taken in *Irving* v. *Wilson* (a), which at the first glance appears to be an authority against the present defendant; but there it was plain that the goods seized were not liable to seizure, and that the officer knew that fact, because he received the money to release them; therefore the payment was made under duress, and was received not colore officii, and it was on these grounds that the Court held that notice of action was unnecessary. The decisive argument on behalf of the defendant, however, is, that this fee of 4*s*. is a just and legal fee, which he was fully entitled to take; first, by prescription; secondly, by the act of parliament and charter of 1 *Ann.*; and thirdly, because there was a good and reasonable consideration for it. With reference to the question of prescription, the Court must, on this occasion, act in the double capacity of jurors and judges, for there was no evidence upon the subject produced at the trial. The case, however, finds that this fee has been regularly and constantly paid in the borough, throughout a period of nearly sixty years, and therefore in the absence of proof to the contrary, the Court will presume that a custom which has prevailed so long, is an immemorial custom. *Rex* v. *Jolliffe* (b).

(a) 4 T. R. 485.

(b) Ante, vol. iii. 240.

[*Bayley*, J. The fee was taken for granting a license; now the power of granting licenses, we know, is not immemorial: how then can we presume that a custom to take fees for granting them is immemorial?] The present argument must go the length of saying, that the power of granting licenses, or some thing equivalent to it, is immemorial. The preamble of the 5 & 6 E. 6. c. 25. shews, that the necessity for regulating the management of alehouses was at that time no new thing, and earlier enactments upon the same subject are to be found in the 12 *E*. 4. c. 8. the 13 *R*. 2. c. 38. the 9 *E*. 3. c. 25. and in *Magna Charta* (9 *H*. 3. c. 25). [*Abbott*, C. J. Admitting all these, still the power of licensing is not carried up to the necessary period; it is not shewn to be immemorial; indeed it plainly appears not to be so. How can we hold that a custom to take fees for granting licenses is immemorial, when the power of granting them, and indeed the very subject of grant appears to have arisen within the time of legal memory? This point really seems to me too plain for argument.] Then, secondly, the 5 & 6 *E*. 6. c. 25. and all subsequent statutes upon the subject, authorise the taking of fees on granting beer licenses. [*Bayley*, J. Some fees by some individuals; but is there any one statute which authorises the taking of this fee by a person in the situation of this defendant?] The 1 *Ann*. certainly seems to authorise it. But, at any rate, it is, thirdly, justifiable to take this fee, because the granting the license was a good and reasonable consideration for it. This is like the case of pickage and stallage in a market. It is not an uncommon thing in many parts of *England*, to pay a fee for selling goods in particular places; and if it is a reasonable fee, the Court will uphold it. What is a reasonable or unreasonable fee is for the judgment of the Court. 2 Inst. 210. [*Bayley*, J. Ought a Justice of the Peace to receive money for the performance of his duty? The proposition is too monstrous to be advanced for a moment. Then ought the defendant to take a fee for performing his duty as the mayor of a borough?]

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The argument is that the defendant was acting as a Justice in granting the license, but that he received the fee as the mayor of the borough, as he might legally do. [*Bayley*, J. What he does as a mayor he does as a justice.] As to the third point, it is clear that the plaintiff cannot recover in this form of action. He paid the money voluntarily with a full knowledge of the law; though even if he were ignorant of the law, that would not entitle him to maintain assumpsit. He knew that the same fee was paid by others under similar circumstances; he had himself paid it before, and he paid it on this occasion without remonstrance or objection. [*Holroyd*, J. Was not the mere act of demanding a fee illegal in a public officer? If so, the plaintiff may maintain his action.] He paid the money voluntarily, with full knowledge, or full means of knowledge, of all the facts of the case, then he cannot recover it back again on account of his ignorance of the law. *Bilbie* v. *Lumley* (a), *Brisbane* v. *Dacres* (b), *Bize* v. *Dickason* (c), *Knibbs* v. *Hall* (d), and *Stevens* v. *Lynch* (e). [*Bayley*, J. Is not *Snowdon* v. *Davis* (f) a case which comes nearer to the present than those, and does it not militate against the doctrine now contended for? Surely, where the money is paid under the influence of duress, or oppression, or fraud, it is recoverable. *Abbott*, C. J. "Ignorance of the law" means of the general law of the land; but a man is not bound to know the local or bye laws of a particular town or borough.] At all events the plaintiff has sustained no hardship, because, as he had paid the fee before, and knew that others had paid it also, no duress, or oppression, or fraud, was practised upon him; he acted voluntarily, with full knowledge both of the law and the facts; and he cannot now come into Court and repudiate his own act by bringing an action.

Rolfe, in reply, was stopped by the Court.

(a) 2 East, 469.
(b) 5 Taunt. 143.
(c) 1 T. R. 285.
(d) 1 Esp. 84.
(e) 12 East, 38.
(f) 1 Taunt. 359.

ABBOTT, C. J.—I am of opinion that the plaintiff is entitled to recover. The first, and, as it seems to me, the main question in this case is, whether the defendant had any legal authority to demand the payment of this fee. It is said that it was legally due to him in his character and office of mayor; but it was received for the granting of a license, which it is admitted he did in his character and office of justice. The case finds that a similar fee has been received on similar occasions for a long term of years; but we cannot therefore presume that there is an immemorial custom for receiving it, especially when we find that the license, in respect of which it is claimed, is not itself immemorial. By the common law, we know that no license was necessary; if there were an immemorial custom in this borough that no person should sell beer without a license, the common law would be restrained, and a license would become necessary there; and then a co-existing custom that the licensed person should pay a fee of 4*s.* would become a good and binding custom, so far as its antiquity went; but whether such a custom would be good in law, it is not at present requisite to decide. But neither of these are proved; there is no proof of any fee being taken earlier than the reign of *Edward* 6. and therefore we certainly cannot presume that it ever was taken before that time; because where a law or custom is to have the effect of narrowing the public right, it is an established rule to require strict and clear evidence of its existence and extent. Then with respect to the notice: if it is admitted that the defendant exacted the fee in his character of mayor, the 24 *G.* 2. c. 44. does not apply; if it is doubtful in which character he was acting, then, according to the case of *Biggs* v. *Evelyn* (*a*), he was entitled to notice: but if it is plain that he was acting in his character of justice, then I am of opinion that he was not entitled to notice in this particular case. The object of the act of parliament was to protect magistrates from the consequences of mistakes or errors of

(*a*) 2 H. Bl. 114.

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judgment, but not of illegal acts done for their own emolument. Now, I think, the defendant's conduct comes under the latter description; he was not acting in execution of his office, nor under any error or mistake, and therefore I think he was not entitled to notice. Then as to the form of action: it is said this was a voluntary payment made with full knowledge of the law and the facts; and if it were so, I admit that the money could not be recovered in this action. But in order to render a payment voluntary, in the proper sense of the word, the parties concerned must stand upon equal terms; there must be no duress operating upon the one; there must be no oppression or fraud practised by the other. But what is the case here? The parties stand upon the most unequal terms imaginable; there is a duress operating upon the publican, for unless he pays the money he cannot obtain his license; there is oppression practised by the justice, because he exacts a fee to which the law does not entitle him, and exacts it upon an implied threat of withholding the license. This cannot be called a voluntary payment, and in that respect this differs from all the cases that have been cited on the part of the defendant, with reference to this point. Upon all the questions raised by this case, I therefore am of opinion that this action is maintainable, and that the plaintiff is entitled to judgment.

BAYLEY, J.—The defendant took the fee either as mayor or as justice. As justice, it is admitted that the law did not allow him to take it; then is there any law or custom which authorises him to take it as mayor? No such authority has been produced to us to-day; and, reasoning upon general principles, we must say that none such can possibly exist. As the chief magistrate of a borough, he has certain public duties to perform, one of which is to grant licenses to such publicans resident within it as are qualified to receive them, and it would be subversive of all decency, as well as of all policy and law, if for the performance of that duty he could be allowed to accept a compensation

in money. But is he liable, in an action for money had and received, to refund this money? If it was paid voluntarily, in the strict and proper meaning of the term, certainly not; except, indeed, where the payment is of a nature to infringe public policy. I think this was of such a nature; for if the defendant can retain such fees as he may chuse to exact, an undue and injurious bias will soon operate upon his mind, and the criterion upon which he will act in granting a license will be, not who is the most deserving of it, but who is able and willing to pay the largest price for it. But neither was this a voluntary payment; the plaintiff stood in a situation of great disadvantage; the defendant had an undue power and influence over him: they were not on equal terms, for the plaintiff was compelled to pay the money. Upon that ground, therefore, the action is maintainable. Lastly, was the defendant entitled to notice of action? As mayor he certainly was not, and as justice I also think he was not, because he did not receive the money colore officii, but acted so as to bring himself within the principle laid down in *Irving* v. *Wilson* (a). It seems to me, therefore, upon every point, that our judgment ought to be given for the plaintiff.

HOLROYD, J.—By the common law licenses were not necessary, and no immemorial usage has been shewn for making them necessary, in this borough; we cannot, therefore, presume its existence. The statute of *Edward* certainly does not authorise a fee of 4*s*., and no custom has been proved to warrant the taking that or any other fee. The license in this case was granted by the defendant, not singly, but with another justice; which makes it evident that he was not then acting as mayor, but that they were both acting as justices. If the act of receiving the fee had been done in the execution of his office, the defendant would have been entitled to notice of the action, even though he acted erroneously in receiving it; for that position *Greenway* v

(a) 4 T. R. 485.

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Hurd (a) is an authority; but it was done with a very different view; it was done for his own benefit and profit, and therefore this case comes within the principle of *Irving* v. *Wilson*. As respected the plaintiff, the payment cannot be considered as voluntary, and therefore, in that point of view, it is equally recoverable. I concur in thinking that our judgment must be given for the plaintiff.

LITTLEDALE, J.—I am decidedly of opinion that the defendant has no legal authority to retain this money. He had no right to receive it, either in the character of mayor or justice. No prescription has been made out, either for the necessity of the license, or for the exaction of the fee. In *Rex* v. *Jolliffe* the antiquity of the custom might fairly be presumed, because there the subject matter of it, a court-lect, was in itself immemorial; but here the custom cannot be presumed, it must be proved. The statute of *Edward* 6. not only does not authorise this fee to be taken, but it does authorise a different fee, namely, "but twelve-pence." The 24 *Geo.* 2., requiring notice of action to justices, does not embrace this case. The action for money had and received is generally exempt from that and other similar statutes; but even if it were not, it certainly would be in this instance, because here the receipt of the money was an act done by the defendant extrà his office, and for his own private emolument; besides that it was exacted by a very improper species of duress and compulsion. It is said that the plaintiff had paid the same fee on former occasions; but that does not vary the case; it was a payment by compulsion in this instance, and had probably been the same in all. I perfectly agree in thinking that the action is maintainable, and that the postea ought to be delivered to the plaintiff.

Postea to the plaintiff.

(a) 4 T. R. 553.

The KING v. The INHABITANTS of LYDD.

Wednesday, May 19.

Where a pauper was hired for three years at £20 a year in capacity of looker, his master telling him at the time the contract was entered into, that he did not think he should have full employment for him; and he served him for three years, during which time he did other work for his master, who paid him for it extra by the job, and he also worked for another master as looker when his leisure suited: Held that the relation of master and servant did not subsist between the parties so as to confer a settlement on the pauper.

BY an order of two Justices, *George Goldsmith*, *Elizabeth* his wife, and their two children, were removed from the parish of *Lydd* to the parish of *Thurnham*, both in the county of *Kent*. Upon appeal, the Sessions quashed the order, subject to the opinion of this court upon the following case:—

In the year 1810 the pauper gained a settlement by hiring and service in the parish of *Thurnham*, and on the 26th or 27th of *August*, 1819, he was hired to Mr. *Fisher*, in the parish of *Midley*, for three years at £20 per annum, as looker and to spud thistles. The duty of a looker is to superintend the flocks and fences upon the lands of his employer, and he frequently has several masters, and works for any person who may employ him, according as his time allows. The pauper served Mr. *Fisher* for three years. He did not work for any person but Mr. *Fisher* for the first year and three quarters of his service, but at the expiration of that time he hired himself as looker to a Mr. *Russell*. During his service with Mr. *Fisher* he did other work for him not belonging to his duty as looker, such as turning mould, lambing, and shearing, for which he was always paid upon new and separate bargains on each occasion, and on other occasions he did day work as a laborer for Mr. *Fisher*, for which he was also paid by the day. At the time of the pauper's contract with Mr. *Fisher* nothing was said about his being at liberty to hire himself to, or to work for other masters during the three years, but Mr. *Fisher* said he did not think he should have full employment for the pauper; he would employ him as far as he could. While he was working for other people his wife hoisted a signal, by putting a flag out of the window, upon which he considered himself bound to quit his work and attend his duty as looker to Mr. *Fisher*, for which he was originally hired, and he invariably returned

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to Mr. *Fisher* when so summoned, and never worked on any lands from whence the flag could not be seen. During the whole of the three years he was not however to do any work for Mr. *Fisher* other than that for which he was originally hired as a looker, without receiving extra wages. His agreement with Mr. *Russell* was by the acre, and he bargained with him for a year at £14. During the whole of the three years he lived on Mr. *Fisher*'s land at *Midley*. The question for the opinion of the Court is, whether the pauper gained a settlement, by hiring and service with Mr. *Fisher*, in the parish of *Midley*?

Bolland and *Claridge*, in support of the order of Sessions. The pauper gained a settlement in *Midley* by a hiring and service in that parish. The Court will confine its attention to the first year of the three for which the contract was made. *Rex* v. *St. Giles, Reading* (a). This was not an exceptive hiring, for no exception was mentioned or stipulated for at the time of the hiring. In *Rex* v. *Chester* (b), the contract was that the pauper should do the offices of a servant for a year for her board and lodging, and should be at liberty to earn what she could by her labor; and a year's service under it was held to confer a settlement. In *Rex* v. *Ozelworth* (c) the pauper agreed to serve three years, at weekly wages, to work twelve hours per day, and if more, to have a penny per hour over; sixpence per week was to be retained as a deposit, to be repaid to the pauper if he performed the agreement, or if his master should discharge him before the end of the three years, which it was understood he might do at any time. The pauper worked under this agreement first for six, and afterwards for nine months, lodging all that time in his master's parish, and it was held that he thereby gained a settlement in that parish. As far therefore as relates to the circumstance, either of the pauper having occasionally worked for other persons, or of his

(a) Cald. 51. (b) 2 T. R. 37. (c) Burr. S. C. 302. 2 Bott. 361.

receiving additional wages from his master upon the contingency of his performing extra work, those cases are authorities for holding that the pauper in this case has acquired a settlement. Again, if this is considered as the case of a customary hiring, there has been both a hiring and a service for a year, sufficient to confer a settlement. *Rex* v. *Newstead* (*a*), *Rex* v. *Navestock* (*b*), and *Rex* v. *Horwick* (*c*). *Rex* v. *Buckland Denham* (*d*), may, perhaps, be cited on the other side to shew, that where a pauper was hired to work only so many hours per day as it was customary to work in a particular trade, and be at liberty to do what he liked at other hours, no settlement can be gained; but upon looking into that case it will be found, that the ground of the decision there was, that the limitation of the working hours was an express exception in the original contract; in which respect it is quite distinct from the present. Upon these grounds, therefore, it appears, that the pauper gained a settlement in the parish of *Midley*.

Berens and *D. Pollock*, contrà. In order to the acquisition of a settlement by hiring and service, it is necessary that the master should have the absolute and entire control over the servant during the whole year; but it is quite clear from the statement of this case that Mr. *Fisher* had no such control over the pauper. *Rex* v. *Horwick* may be admitted as an authority to shew, that a custom for a servant to have *Sunday*, or even some other part of the week to himself, will not defeat a settlement, provided there is no express exception to that effect in the contract; but still it does not by any means govern the present case, because it was expressly stated by Mr. *Fisher* when the pauper was hired, that he should not have full employment for him. It is laid down by *Best*, J. in *Rex* v. *Edgmond* (*e*), that, in order to constitute a sufficient yearly hiring, the master must

(*a*) Burr. S. C. 669.
(*b*) Burr. S. C. 719.
(*c*) 10 East, 489.
(*d*) Burr. S. C. 694.
(*e*) 3 B. and A. 107.

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stipulate for the entire service during the whole year, for the learned judge is there reported to have said, "the master does not, in this case, stipulate for an entire service during the whole year, but only for certain hours during each day; and that, according to *Rex* v. *Kingswinford* (a), invalidates the settlement;" and if that is correct law, it is clear that the settlement here is invalidated, for there is nothing like a stipulation here for the entire service of the pauper, but, on the contrary, an express declaration that his entire service will not be wanted. But the very last case decided upon this head of settlement, *Rex* v. *Polesworth* (b), is directly in point with the present, and is a clear authority for saying that there was no hiring for a year and no service for a year, so as to confer a settlement upon this pauper within the meaning of the statutes.

Abbott, C. J.—I am clearly of opinion that the contract made between these parties is not such as constitutes the necessary relation of master and servant, within the plain and established meaning of the statutes regulating this particular head of settlement. It is quite evident from the facts of the case, that Mr. *Fisher* never stipulated for, and in point of fact never had the control over the pauper, or the right to his entire service, for one whole year. It is therefore impossible to hold that the pauper acquired a settlement by his service under his contract with Mr. *Fisher*, and consequently the rule for quashing the order of Sessions must be made absolute.

Bayley, J.—The present appears to me to be in some particulars a new case, but in one respect it is quite of an ordinary nature, and is open to a well-known and decisive objection, namely, that the contract upon which it rests does not constitute a hiring for a year. It is in effect an exceptive hiring, for the pauper is told originally that there will not be full employment for him, and he acts upon that

(a) 4 T. R. 219.

(b) *Ante*, p. 258.

declaration by obtaining work from time to time of other persons. Indeed the very nature of the service, as stated in the case, shews that the master could not have intended to contract for the exclusive service of the pauper, because it is impossible that such an employment could fairly occupy the whole time or call forth the entire labor of any ordinary servant. I entirely concur in the opinion that no settlement was acquired by the pauper in the parish of *Midley*.

LITTLEDALE, J. (*a*)—*Rex* v. *Horwick* is the only case cited which bears any resemblance to, or forms any authority for, the present, and even that is distinguishable from it in one important particular; for there, the pauper was provided with full and fair employment by one and the same master; whereas here, the work done cannot possibly be rated as the entire service of any husbandman, and the pauper actually resorts to other employers to fill up the measure of his labor and to augment the sum of his wages. Upon the grounds already detailed by the Court, I am also of opinion that the order of Sessions must be quashed.

Rule absolute for quashing the order of Sessions.

(*a*) *Holroyd, J.* was sitting in the Bail Court.

The KING *v.* The INHABITANTS of HALLOW.

Wednesday, May 19.

Where a servant under a yearly hiring served for eleven months and two days, and was then committed to and imprisoned in the House of Correction for one month under 20 G. 2. c. 19. for misbehaviour, at the instance of the master: Held, that the commitment and imprisonment were no dissolution of the contract, or such an interruption of the service as to prevent a settlement, although the servant received no wages for the time he was in custody.

BY an order of two justices, *Thomas Hewitt, Elizabeth* his wife, and their two children, were removed from the parish of *Powick* to the parish of *Hallow*, both in the county of *Worcester*. On appeal, the Sessions confirmed the order, subject to the opinion of this Court upon the following case:

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The pauper, *Thomas Hewitt*, gained a settlement in the parish of *Hallow*, about fourteen years since, by a hiring and service for a year in that parish. At the expiration of that service, he entered into the service of one *John Price*, in the parish of *Tibberton*, also in the county of *Worcester*, having been previously hired by him at *Pershore Mop*, a few days before old *Michaelmas*, (when his service at *Hallow* expired) to serve him as waggoner's boy from the said old *Michaelmas* to the old *Michaelmas* following, at the wages of *£5*. The pauper went into the service of *Price*, according to that hiring, and remained with him, serving him in the parish of *Tibberton*, till about a month before the old *Michaelmas* day, at which his service was to end, when disputes having arisen between his master and him, in consequence of his master having charged him with misconduct, he was summoned by his master before Mr. *Gresley*, a magistrate of the county, on the 15th *September*, 1809, to answer that charge. Upon hearing the complaint, it was agreed, between the magistrate and *Price*, that the pauper should either beg his master's pardon, and be received back into his service, or, if he refused to beg his pardon, that he should remain the rest of his year in prison. The pauper refused to beg *Price*'s pardon, and was thereupon committed to the House of Correction, by virtue of a warrant of commitment which stated, that " Whereas, complaint hath been made before me, *P. G.* Esq. one, &c., upon the oath of *John Price*, of *Tibberton*, that *Thomas Hewitt*, servant of the said *J. P.* in husbandry, hath committed divers misdemeanors against him his master, and particularly by leaving the service of his said master on *Wednesday* last, and absenting himself therefrom the whole of such day, whereby the said *J. P.* lost the service of one of his teams such day, having no other person to drive the same: And whereas upon due examination, &c. the said *T. H.* is and stands convicted before me of the said offence, I do hereby," &c., concluding in the ordinary form, with a commitment " for the space of one calendar month from the date

hereof." The warrant bore date the 15th *September*, 1809. The year for which the pauper had been hired by *Price* expired two days before the expiration of the calendar month for which he was committed. The pauper remained in prison during the whole of the said calendar month, and at the expiration of it was discharged. During the time of his imprisonment the pauper's clothes remained at the house of *Price*, in *Tibberton*, and when the pauper left the prison, he went to *Price's* house and took away his clothes, and received from *Price* all his wages except seven shillings, which *Price* deducted for the time the pauper had been in prison, and he then quitted the house. The question for the opinion of the Court is, whether there was a sufficient service for a year by the pauper under the last mentioned hiring to give him a settlement at *Tibberton*, subsequent to the settlement at *Hallow*.

Russell and *Ryan*, in support of the order of Sessions. The question in this case is, whether, during the period which the pauper passed in prison, he can be considered as continuing in the service of his master, which, it is contended, he cannot. The actual service was unquestionably incomplete, and the circumstances are not such as will warrant the Court in holding that the deficiency was made up by an implied service. Now, in order to confer a settlement upon this pauper, he must have rendered either an actual or implied service for an entire year. *Rex* v. *Barton-upon-Irwill* (*a*) will probably be cited on the other side to shew that there was no dissolution of the contract between the parties, and therefore that the service continued during the imprisonment of the servant. That case, however, is distinguishable from the present. There the servant returned to his master after the expiration of his imprisonment, was received by him, and continued to serve under the original contract; here, the servant does not return to the service after his imprisonment, nor ever serves

(*a*) 2 Maund S. 329.

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again under the contract.—[*Bayley*, J. The pauper's being sent to prison was, in substance, the act of his master, and, therefore that did not dissolve the previously existing relation of master and servant.]—Unless there was some subsequent act of the master to shew that he intended only to dispense with the last month's service, the sending the servant to prison did operate as a dissolution of the contract. Now there was no such act, for the pauper never returned to the service, and the relation of master and servant was never revived between him and Mr. *Price*; there is therefore no evidence of a dispensation here. In *Rex* v. *North Cray* (*b*), where the servant was committed before the end of his year for not giving security respecting a bastard child, and the master was overseer, and had been active in his commitment, and afterwards deducted out of his wages on account of his absence, the Court held it to be a dissolution.—[*Bayley*, J. Is this case distinguishable from *Rex* v. *Barton-upon-Irwill*? There *Le Blanc*, J. said "It is said indeed that there was an interruption of the service, but during the whole time he (the pauper) was subject to his master. It was under the authority of the contract that his master acted, when he punished him for misconduct; therefore it was not a dissolution. The master might, perhaps, have elected to dissolve it, but he has not done so. Neither do I think this was an interruption of the service to prevent a settlement."] The ground upon which the Court there decided that there was neither a dissolution of the contract, nor an interruption of the service, was, that the pauper returned to the service after his imprisonment, and in that important particular the present case differs from that. But it is perhaps not necessary to contend that there was a dissolution of the contract here; it is enough to shew that there was no dispensation of the last month's service, and then there is clearly an interruption of the service, so as to defeat the settlement. By the 8 and 9 W. 3. c. 30. the person claiming a settle-

(*b*) Cald. 495.

ment by hiring and service must "continue and abide in the same service during the space of one whole year," which this pauper certainly has not done. The 20 G. 2. c. 19. s. 2. which empowers magistrates to punish servants for misconduct, either by commitment to the House of Correction, or by abating some part of their wages, or by discharging them from their service, will be relied on by the other side, but it does not help this case. The language of the warrant shews that the pauper was committed for a default in his service; how then can it possibly be argued that a residence in prison as a punishment for not performing his service, was either an actual or an implied service by the pauper? *Pawlett* v. *Burnham* (a) is an authority for saying that an interruption or discontinuance of the service is sufficient to defeat a settlement, and as there was no dispensation by the master of the last month's service, and no actual or implied service by the pauper during that time, the service is incomplete, and no settlement has been gained under it.

Nolan, (with whom was *Shutt*,) contrà, relied upon the 20 *Geo.* 2. c. 19. s. 2., contending that by resorting to that statute for the purpose of punishing the servant, the master had consented to dispense with the actual performance of the residue of the service, but that by operation of law the contract remained undissolved, and the residence in prison was an implied performance, sufficient to confer a settlement. He was proceeding to distinguish this case from those cited, when he was stopt by the Court.

Abbott, C. J.—I am of opinion that there was a complete service by the pauper in this case for one whole year, sufficient to confer upon him a settlement in the parish of *Tibberton*, and consequently that the order of Sessions, confirming the order of removal to the parish of *Hallow*, must

(a) 2 Bott. 300. See *Rex* v. *Westerleigh*, Burr. S. C. 753. and *Rex* v. *Winchcombe*, Doug. 391.

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be quashed. The object of the 20 *Geo.* 2. c. 19. was to enable masters to punish their servants for misconduct, *in their character of servants.* It does, indeed, empower magistrates, in their discretion, to discharge the servant from his service, and thereby to dissolve the contract; but where the magistrate and the master, as in this case, jointly elect to punish the servant by imprisonment, the plain object of the statute would be defeated, if we were to hold that the contract was dissolved, or the service discontinued, by the imprisonment. It appears to me that, by construction of law, the pauper was "abiding and continuing" in his master's service during the period of his imprisonment, and therefore that he has performed his full year's service under the contract, and has thereby acquired a settlement.

Bayley, J.—I think the principles laid down by *Le Blanc*, J., in *Rex* v. *Barton-upon-Irwill* (a), and to which I have already alluded, fully govern the present case; and it is very important in this branch of the law to adhere as closely as we can to former decisions, and to avoid nice and subtle distinctions. The pauper was committed at the suggestion of his master. Previous to his commitment it is not disputed that the relation of master and servant subsisted between them. Therefore the labor performed by the pauper in the House of Correction was, by construction of law, and in my opinion according to common sense also, service done by him in the character of a servant for his master. It seems to me to be perfectly unimportant at what period of the service the imprisonment took place, whether in the last month, or in the middle of the term; nor do I think that the fact of the pauper's not returning to the service varies the case. As the imprisonment ended about the time of the expiration of the year contracted for, neither party was bound to renew the contract; and if it had ended before the expiration of the year, each party would have been bound by law to perform the residue of it: the ser-

(a) 2 M. and S. 329.

vant must have returned to his service, and the master must have received him.

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HOLROYD, J.—I am satisfied that by operation of law the relation of master and servant continued to subsist between these parties, as well during the imprisonment of the pauper as before. The neglect of actual service during the last month was occasioned by the act of the master, and did not arise out of any criminal offence of the pauper, for which he might have been discharged from his service. By the election of the master himself he is not discharged; the contract therefore was not dissolved, and the service continued; and whether it was performed about the master's affairs, or in the shape of labor imposed as a punishment, is immaterial.

LITTLEDALE, J.—The master in this case made his election to punish the servant, and not to turn him away; therefore the imprisonment suggested by him, and assented to by the magistrate, could not operate as a dissolution of the contract. The absence of the servant was not wilful, nor superinduced by any voluntary act of his, but was rendered unavoidable by the compulsory act of his master. The labor performed in the House of Correction, therefore, was virtual service under the contract, and the yearly service having been thus completed, the pauper is entitled to his settlement.

Order of Sessions quashed.

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The King *v.* The Inhabitants of Market Bosworth.

A mistress hired a servant from *Shrove Tuesday* until *old Michaelmas* day following, and three weeks before the latter day asked her to "stay again;" to which the servant replied, she had no objection, if they could agree about wages. They agreed for 3*l.* 10*s.*, and one shilling earnest was paid, but nothing was then said as to the time the service was to continue. A fortnight before *old Michaelmas* the mistress said to her, "I have hired you, but mentioned no time; remember you are hired for fifty-one weeks;" to which the servant replied, "Very well." The servant lived with her mistress for a year under this agreement. She had three days holidays at *Christmas*, and four other days at different times afterwards, and at the end of the year received her wages: Held, that this was a yearly hiring and service to confer a settlement.

TWO Justices, by their order, removed *Hannah Stain*, single-woman, from the parish of *Fleckney* to the parish of *Market Bosworth*, both in the county of *Leicester*. On appeal, the Sessions confirmed the order, subject to the opinion of this Court upon the following case:

The pauper was hired by, and lived with, Mrs. *Worthington*, in the appellant parish, from *Shrove Tuesday*, 1821, until old *Michaelmas* day following. Three weeks before the last mentioned day Mrs. *Worthington* asked the pauper "to stay again;" to which she replied, that she had no objection, if they could agree about wages. They agreed for 3*l.* 10*s.*, and one shilling earnest was paid. At the hiring nothing was said as to the time the pauper was to serve. There was no interval between the first and second service. A fortnight before old *Michaelmas* her mistress said to her, "Hannah, I have hired you, but mentioned no time; remember you are hired for fifty-one weeks." To this the pauper answered, "Very well." The pauper lived with Mrs. *Worthington* until old *Michaelmas* day, 1823. She asked to have her week just before *Christmas*. Mrs. *Worthington* said, "You shall have three or four days now; I cannot spare you the whole week." She staid away three successive days and nights then, and had the other four days at different times during the year, returning on each of them to sleep at her mistress's; and her mistress gave her two or three holidays besides. She never was absent without her mistress's permission, and always returned into the service, and at the end of the year received her wages. The question for the opinion of

the Court, is, whether the pauper acquired a settlement in the parish of *Market Bosworth*, by the hiring and service above stated.

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Reader, *Hildyard*, and *Humfrey*, in support of the order of Sessions. The Sessions have done right in confirming the order of removal. It is impossible to imagine a clearer case of hiring and service for a year than this. The subsequent declaration of the mistress, though assented to by the pauper, does not alter the original yearly hiring, and the week's absence then agreed upon and ultimately had, was merely a dispensation of so much service, and not an exception in the contract. *Rex* v. *Sulgrave* (*a*) is an authority to that point, and applies directly to the present case. The conduct of the parties is conclusive, to shew that each understood and intended the original hiring for a year to remain unaltered; for the pauper stays her full year, and receives her full amount of wages when the year expires; and the mistress exercises her right to the service throughout the year, by dictating the periods at which the servant was to be absent, according to her own choice or convenience. Besides, upon the evidence stated in the case, the question before the Sessions was one of fraud, which, as was said by *Buller*, J., in *Rex* v. *Fillongley* (*b*), "is open to the Sessions in every case as it arises. It is the peculiar jurisdiction of the Justices, and not of this Court, to say, whether the particular case be fraudulent or not." Upon either ground, therefore, the Court will feel themselves bound to confirm this order of removal.

G. Marriott and *Clinton*, contrà, endeavoured to distinguish this case from *Rex* v. *Sulgrave*, contending that here the original contract was dissolved, and a new hiring for 51 weeks agreed upon by the parties, whereas in that case

(*a*) 2 T. R. 376. See *Rex* v. *Milwich*, Burr. S. C. 433. *Rex* v. *Macclesfield*, 3 T. R. 76. and *Rex* v. *Mursley*, 1 T. R. 694.
(*b*) 1 T. R. 458.

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there was only a dispensation of the service for a part of the time originally contracted for.

BAYLEY, J. (a)—Whether, upon the facts of a case, there has been a dissolution of the contract, or a dispensation of the service, and whether there has or has not been fraud in the transaction, are, generally speaking, questions for the Justices at Sessions to decide; and when they have decided them, the general rule is, that this Court will not interfere. But when the Sessions entertain doubt upon any particular case, and it has been brought before us at considerable expense in consequence, it is competent, and indeed proper, for us to give our opinion upon it. I am of opinion, that the pauper in this case has gained a settlement by hiring and service in the parish of *Market Bosworth*, because it seems to me, either that there was a dispensation of a week's service, or that the second contract was tainted with fraud. In order to decide whether there has been a dispensation of a portion of the service, it is important to consider whether the service has been rendered incomplete by the act or request of the master, or of the servant. The requisites to confer a settlement by hiring and service, are, a hiring for a year, a complete service for a year, and a service under a yearly hiring. I am of opinion that all these requisites have been complied with here, and that there was a dispensation of one week's service by the pauper's mistress. The first conversation, in which the mistress asked the pauper "to stay again," and the pauper consented to stay, was a general hiring, and therefore, by construction of law, a hiring for a year. The agreement between the parties was then complete, and earnest was paid in ratification of it. But, it is said, that agreement was dissolved or altered by the subsequent conversation. The conduct of parties, however, frequently expresses their intentions more clearly than their words, and the subsequent conduct of these parties from the moment

(a) Abbott, C. J. was gone to Guildhall.

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of the second conversation up to the close of the year, seems to me to prove most clearly that no bonâ fide alteration was made, or was even intended to be made, in the original agreement. Then, if this be a correct conclusion from the facts stated, *Rex* v. *Sulgrave* (*a*) comes in as an authority expressly in point, and in conformity with that decision we must hold, in point of law, that there has been a settlement gained by this hiring and service. In *Easter* Term, 1817, there was another case decided, which in principle also bears on this, namely, *Rex* v. *Coggeshall* (*b*). I am therefore clearly of opinion that the Order of Sessions must be confirmed.

Holroyd, and Littledale, Js. concurred.

Order of Sessions confirmed.

(*a*) 2 T. R. 376. (*b*) 6 M. & S. not yet in print.

The King *v.* The Inhabitants of St. Mary, Kidwelly.

Wednesday, May 19.

Where by a parol contract the master agreed to teach the pauper the trade of a shoemaker for twelve months, for which the master was to receive a guinea, the pauper's father finding him board and lodging during the time; and at the expiration of the year, the pauper entered into a fresh agreement, to work with his master for twelve months, making shoes at 3*d.* per pair the first half year, and at 4*d.* per pair the remaining half year, and at the end of six months he quitted the service altogether: Held, that there was not a connected hiring and service, so as to confer a settlement.

BY an order of two justices, *William Williams*, *Catharine*, his wife, and their four children, were removed from the parish of *St. Mary*, in the borough of *Kidwelly*, to the parish of *Llandevilog*, both in the county of *Carmarthen*. The Sessions, on appeal, quashed the order, subject to the opinion of this Court, on the following case:

The appellants proved that when the pauper was about fourteen years of age, he lived with his father in the parish of *St. Ishmael*, in the county of *Carmarthen*, and being desirous of being apprenticed to a shoemaker, his father agreed with a neighbour, named *John Thomas*, a shoe-

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maker in the same parish, to give him a guniea for teaching his son the trade of a shoemaker for twelve months, the father finding the pauper lodging and every thing else during that time. The pauper served the whole twelve months under that agreement. There was no indenture or writing, but the pauper considered it as an apprenticeship, and his father and master treated and spoke to him as an apprentice during such twelve months, and both told him there was a guinea paid for teaching him the trade. The pauper's father, at the end of the year, came to an agreement with *John Thomas*, that the pauper should work with him for twelve months, making shoes at three pence per pair the first half year, and at four pence per pair the remaining half year. The pauper worked with *John Thomas* about six months under that agreement, and then went away and worked at several places, until his marriage, which happened in 1785. He soon afterwards removed to the parish of *St. Mary*, and in the year 1790, one *Owen Roberts*, by an indenture of lease under seal, without livery of seisin indorsed, demised a spot of ground in the parish of *St. Mary*, to the pauper, and his heirs and assigns, for his own, and two other lives, at the yearly rent of 10*s.* 6*d.*, payable half yearly, on which spot he immediately afterwards built a cottage, in which he lived until the 25th *March* last. About five years ago, the pauper being indebted to a Mr. *Jones*, a currier, for leather, he deposited the lease with him as a collateral security for the debt he owed him. In *January* last, he sold and assigned his interest in the lease to Mr. *Jones* for 40*l.*, in part liquidation of his demand, and agreed to give up the possession on the 25th *March* following, on which day he quitted accordingly, and never afterwards claimed any interest in the lease. The pauper had sold his interest and given up the possession of the house before the order in question was made for his removal to *Llandevilog*. On this evidence the Sessions quashed the order of removal, subject to the opinion of this Court, whether the pauper had gained a settlement by hiring and service

in the parish of *St. Ishmael*, or by virtue of the said lease in the parish of *St. Mary*, under the circumstances above stated.

Nolan and *D. S. Davies*, in support of the order of Sessions. The question, whether the pauper gained a settlement by estate in *St. Mary*, must be abandoned as too plain for argument; and therefore the only point is, whether he acquired a settlement by hiring and service in the parish of *St. Ishmael*. After the first agreement had expired, there is no doubt that the pauper hired himself for a year in the character of servant, although he only served six months; and the question is, whether the original bargain was for a state of pupilage, or of service in the ordinary acceptation of the word; for if it was the latter, the second service will connect with the former, and then all the requisites of the statute will have been complied with, so as to confer a settlement by hiring for a year, and service for a year. Undoubtedly the 8 and 9 *W.* 3. c. 30. provides that no person shall obtain a settlement by hiring and service, "unless such person shall continue and abide *in the same service* during the space of one whole year." The meaning of that statute, however, clearly must be, that the pauper shall have served a year in a service of one and the same kind or nature; not that he shall have served a year under one and the same contract or agreement. For this exposition of the act of parliament *Rex* v. *Dawlish* (a) seems to be an authority, and it seems also to decide that the two services described in this case may well connect, so as to make up a year's service under the second agreement, which was for a yearly hiring. In that case the pauper, before the expiration of her apprenticeship, hired herself, and served for a year, the last four months of which were after her indentures had expired; and then hired herself to the same person for another year, but served only ten months: and it was held that the first service (although without the knowledge or

(a) 1 B. and A. 280.

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consent of the master) might be coupled with the service under the last contract, and that the pauper thereby gained a settlement. The judgment of *Abbott*, C. J. in that case is expressly in point. His Lordship said, "The first contract was either valid or void; if valid, then there is a good hiring and a good service; if void, then the first year's service will be a service under no contract at all, which, according to the argument, it is admitted, may be coupled with the service under the second hiring." [*Bayley*, J.—The real question here seems to be, whether the pauper can be considered as serving under the denomination of hired service during the time for which he was bound to *John Thomas*, for the purpose of learning his trade.] Undoubtedly that is the point in dispute, and it will be urged on the other side, either that there was no service performed during that time, or if there was, that it was service as an apprentice, and therefore will not connect with the subsequent service under a yearly hiring. But the question, whether there was service, in the proper sense of the word, under the first agreement, is one of fact, and is answered in the affirmative by the Sessions. Besides, it is perfectly clear, from the circumstances of the case, and from the conduct of the parties, that they mutually intended and understood that service was to be performed, and in pursuance of that intention and understanding the pauper did, in fact, serve for twelve months. If the agreement for that service was made, and the service itself performed, as an apprentice, the agreement undoubtedly is void; but the service itself is not the less valid, nor the less competent to be coupled with subsequent service under a valid agreement(*a*). [*Holroyd*, J.—The words of the statute are, "shall continue and abide in *the same service*." At least they must mean service ejusdem generis. Can it be said that the two services here were of the same kind? *Bayley*, J.—In *Rex* v. *Dawlish* there was a year's service after the expiration of the indenture, and during a time when the mas-

(*a*) See *Rex* v. *Shinfield*, 14 East, 541.

ter had a right to the service of the servant. This is quite a different case; this is the case of teacher and scholar; the relation of master and servant never existed in connection with the first service.]

Russell and *E. V. Williams*, contrà, were stopt by the Court.

Bayley, J.(a)—I am of opinion that the pauper did not gain a settlement by hiring and service in the parish of *St. Ishmael*. There is undoubtedly a hiring for a year in the second instance in the character of a servant, and if that could be connected with the preceding contract, a settlement would be gained; but in order to gain a settlement by a connected hiring and service, I take it that the first contract must be for a service under some species of hiring, either for a year, or for an indefinite period; or else it must be a state of things which constitutes the relation of master and servant, and casts upon the latter the obligation to serve, and confers upon the former the right to require service. Now was the relation between the pauper and his master, during the first year, anything more than that of teacher and scholar? If it was nothing more, then it cannot be connected with the service under the second contract so as to confer a settlement. The case of *Rex* v. *Bilborough*(b) seems to me to be decisive of this case. There the pauper's father agreed with one *Smith* that he should teach the pauper to make stockings during the year next ensuing, and should receive the sum of two guineas for such instruction; and it was further agreed that the pauper should have his earnings, and pay *Smith* for the use of his frame, needles, and other utensils, and for seaming such stockings as the pauper should make. The pauper stayed a year and a half; and therefore if that was a relation of which it could be predicated that there was service per-

(a) *Abbott*, C. J. was gone to *Guildhall*.
(b) 1 B. and A. 115.

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formed in the character of servant, it would have been sufficient to confer a settlement; but the Sessions thought there was no settlement, and a case being reserved, this Court confirmed their decision, on the ground that the relation between the pauper and his master was merely that of teacher and scholar, and not that of master and servant. In this case, looking at the first contract from the beginning to the end, there was no obligation on the part of the pauper to serve; he was only to be taught; the master could not, during any part of the time, have called upon him to serve, or have punished him for neglecting to serve, in pursuance of the bargain entered into on his behalf. I take it to be a fixed rule respecting connected services, that although a service under a hiring for a year may be connected with a different species of service, yet there must be an obligation on the part of the servant to serve during the whole length of time which is necessary to confer a settlement. Therefore, inasmuch as in this case there was no relation of servant, and no obligation to serve until the hiring for a year commenced, and there being only a service for half a year under that hiring, no settlement was, in my opinion, gained.

Littledale, J.(a)—I am of the same opinion. The pauper, during the time he was with Mr. *Thomas*, was a mere scholar, and never stood in the situation of a servant. He performed no service as a servant; he had no obligation upon him to perform any such service; nor had Mr. *Thomas* any right to require it of him. The case, therefore, is in all respects mainly different from *Rex* v. *Dawlish*.

Order of Sessions quashed.

(a) *Holroyd*, J. went to chambers during the argument.

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WILLIAMS *v.* Lord BAGOT (In error).

Wednesday, May 19.

This Court will order an inferior Court to amend its record according to the *facts* of the case as they occurred below, after an imperfect record had been annexed to a writ of error brought in this Court upon the judgment. Certiorari issued to the judge of an inferior jurisdiction to return the practice of his Court.

THIS was a rule calling on the plaintiff to shew cause why the record annexed to the writ of error brought in this court by the defendant, upon the judgment of the Lordship Court of *Ruthin*, in the county of *Denbigh*, in this cause, should not be remanded, to be amended according to the facts of the case; and why the steward of the said Court should not certify upon oath to this Court, the practice of the said Court.

Patteson now shewed cause, and contended, that this Court had no authority to order an inferior Court to amend its record. He cited *Morse* v. *James* (*a*), 1 *Roll. Abr.* 208. (G) pl. 2. *Dunbar* v. *Hitchcock* (*b*), and *Tidd*, 159.

Chitty, contrà, was stopped by the Court.

ABBOTT, C. J.—If an inferior Court issues informal process, I agree we cannot order them to amend it; but if they send up an incomplete record, we may order them to complete it. The complaint here is, not that the inferior Court has sent up an informal, but an incomplete record. The authorities cited do not apply to this case; because here the inferior Court is not called upon to alter any thing which has already been stated on the record, but is required to introduce something which has been improperly omitted. It is alleged, that in drawing up the record the Judge has not truly stated the proceedings as they actually took place in the Court below. If we are not to order, or allow the officers of the Court below to make a perfect record, which unquestionably they are at liberty to do, it will be in their power, by making an imperfect record, to defeat a writ of error whenever it shall be brought. The power of doing that lies in their hands, unless we prevent it. I think, there-

(*a*) Willes, 122. (*b*) Marsh. 382. S. C. in error. 3 M. & S. 591.

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fore, the record annexed to the writ of error in this case, ought to be remanded for the purpose of being amended according to the facts.

BAYLEY, J.—I am of the same opinion. The object here is to introduce a common law amendment; all that is asked is, that the record shall truly state the facts as they occurred in the Court below, and I have no doubt that we have authority to order the steward to amend the record in that respect.

HOLROYD, J. and LITTLEDALE, J. concurred.

It then became a question as to the manner in which the other part of the rule should be complied with; namely, that which called upon the steward of the Court below to certify, upon oath, the practice of the Court; whether the steward ought to state the practice of his Court upon affidavit or certify it judicially; and it was resolved, that the proper course was to issue a certiorari to the steward to return the practice; for which, the reason assigned was, that if the judgment of this Court upon the writ of error brought, should hereafter be reviewed by the House of Lords, the steward's affidavit would not go up as parcel of the record, but the certiorari and return thereto would; and the case of *Rex* v. *Ponsonby* (a) was cited.

The first part of the rule was then made absolute on payment of costs; a certiorari was ordered to issue to the steward of the Lordship Court, to certify the practice; and leave was given to the plaintiff, in error, to assign errors anew, if he thought proper.

Scarlett and *R. V. Richards* appeared for the steward.

(a) 1 Wils. 303.

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THOMAS *v.* PEARCE.

Thursday, May 20.

If a defendant, at the time he is served with the copy of non-bailable process, demands to see the original, and is refused, the service is irregular.

ON shewing cause against a rule nisi, for setting aside the service of the bill of *Middlesex* in this case with costs, for irregularity, the question was, whether, in serving the copy of non-bailable process, it is necessary to shew the defendant the original, when he demands to see it. The defendant had asked to see the original when served with the copy, but was told by the plaintiff that he had it not with him. The authorities cited were *Worley* v. *Glover* (*a*), *Panchand* v. *Woolley* (*b*), *Edgar* v. *Farmer* (*c*), *Westley* v. *Jones* (*d*), and *Tidd.* 168. 8th. Ed.

BAYLEY, J. (*e*)—The rule to be collected from the cases upon this point, and which are referred to by Mr. *Tidd*, is, that the person serving the copy of the writ is not bound to shew the original, unless it is demanded; but if it is demanded it must be shewn. In *Worley* v. *Glover* the Court said, it was not necessary to shew the party the original writ, as on the service of rules, because the 12 *Geo.* 1. c. 29. only required him to be served with a copy. But in *Edgar* v. *Farmer* it was expressly decided that the service of process is bad where a sight of the original, being demanded, is not granted. There is very good reason for that, because the party serving may deliver to the defendant that which purports to be, but is not, the copy of process; and though an attorney would be guilty of a contempt of Court in delivering the copy without having sued out the original, yet the defendant has a right to be satisfied that there is an original of that which purports to be a copy; and if he requires to have a sight, he is entitled to see it. That point was distinctly decided in the case of *Westley* v. *Jones*. There the defendant was served with a copy of a capias, and in a quarter of an hour afterwards demanded to see the original, which was refused by the officer; and all the Judges of that

(*a*) 2 Stra. 877.
(*b*) Barnes, 302. 422.
(*c*) Cas. temp. Hard. 138.
(*d*) 5 J. B. Moore, 162.
(*e*) *Abbott*, C. J. was gone to Guildhall.

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Court were of opinion, that if a copy of process is served, and the defendant demands to see the original, he has a right to see it, and unless that demand is complied with, the service of the copy is irregular. This being so distinctly laid down and understood to be the settled rule, I think we ought to abide by it.

HOLROYD, J. and LITTLEDALE, J. concurred.

Rule absolute for setting aside the service of the process.

Archbold for the plaintiff, and *Reader* for the defendant.

R. PLACE *v.* J. JACKSON.

Thursday, May 20.

Where commissioners under an inclosure act, awarded, that certain persons, entitled to a right of common in certain commonable lands, "shall for ever hereafter use and enjoy the said commonable place as a common pasture, *exclusive of all others whatsoever*:" Held, that the right of the commoners was still subservient to the right of the lord to take stone, it appearing that, both before and since the award, the lord had exercised that right; and that an action was not maintainable against his lessee, although the soil had latterly been subverted to an unusual extent. It seems, however, that if the lord wantonly and unnecessarily exercises his manorial rights to the injury of the commoners of pasture, he is liable to an action.

CASE for disturbing the plaintiff's common of pasture for one cow, upon a certain commonable place, called *Mount Sorrel Hills*, in the county of *Leicester*. Plea, Not guilty, and issue thereon. At the trial, before *Hullock*, B. at the last Assizes for the county of *Leicester*, it appeared that the plaintiff, as owner or occupier of two out of sixty-eight ancient houses in the town of *Mount Sorrel*, claimed to be entitled to the exclusive pasturage of certain commonable lands, called *Mount Sorrel Hills*, consisting of about eighty acres, and to have the enjoyment thereof without disturbance from the lord of the manor, under the terms and provisions of an act of parliament, passed in 1771, for enclosing the same. The alleged disturbance of the plaintiff's right of common, was in the destruction of the herbage by the act of the defendant, who as lessee of the lord of the manor of *Mount Sorrel*, dug for stone upon the common in question, and thereby destroyed four or five acres of the best pasture, and consequently diminished the plaintiff's right of common.

The preamble of the above-mentioned act stated, that there were 300 acres of open fields and commonable grounds, and also a certain commonable place called *Mount Sorrel Hill*, within the manor of *Mount Sorrel*, of which Sir *John Danvers*, Bart. was lord; and after reciting, that it would be advantageous to the several persons interested in the said open fields and commonable grounds to have the same divided, and specific parts thereof allotted to them according to their several interests therein, to be held in severalty for ever, and to have the said commonable place called *Mount Sorrel Hills* inclosed, used, and occupied as therein after directed; it proceeded to enact that the commissioners, should set out for the surveyors, for the time being, of the highways of *Mount Sorrel*, of the said fields and commonable grounds, so much land, not exceeding an acre, as they should think proper, for getting stone, gravel, or other materials for the repair, from time to time, for ever, of the public highways in the lordship and liberties of *Mount Sorrel*; that they should set out and allot to Sir *John Danvers* as lord of the manor, so much of the said fields and commonable grounds, as should in their judgment be equal in value to his interest therein; and that they should allot and appoint the said common place, called *Mount Sorrel Hills*, as a common pasture for the benefit of such persons only as they or any two of them should determine to be entitled to a right of common thereon, which commonable place should for ever thereafter be used and enjoyed as a common pasture by the persons so determined to be entitled to the right of common thereon, *exclusive of all others whatsoever*, and should for ever thereafter be occupied in such manner, and in such proportions, and subject to such orders and regulations in every respect, as the commissioners by their award should order. By another clause the commissioners, in case any difference should arise between any of the parties interested in the inclosure touching their respective rights, were authorised to determine the same, and their determination was to be binding and conclusive upon all parties. By

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another section it was provided that nothing in that said act contained should prejudice, lessen, or defeat the right, title, or interest of the lord of the manor, or as lord of the soil of *Mount Sorrel Hills*, but that he, his heirs and assigns, should and might at all times for ever thereafter, hold and enjoy all rents, services, &c. privileges and pre-eminences whatsoever to him as lord of the manor of *Mount Sorrel* and lord of the said soil, then incident, appendant, belonging, or appertaining (other than and except the rights of the soil in such of the then present roads, as should in virtue of the act be allotted to any other person or persons, and the right of common that could or might be claimed by the lord of the manor merely as such, upon the said fields and commonable grounds) in as full, ample, and beneficial a manner to all intents and purposes, as he or they could have held and enjoyed the same, in case that act had not been made. The commissioners, by virtue of this act, proceeded to execute the same, and after making allotments to the surveyor of the highways of *Mount Sorrel*, to the lord of the manor, and to the several other persons interested in the inclosure, made an award with respect to *Mount Sorrel Hills* as follows—"That the said commonable place called *Mount Sorrel Hills*, is the sole property of the owners of the said common right houses, exclusive of the owners and occupiers of the said fields and commonable grounds to be enclosed; and respecting the said commonable place called *Mount Sorrel Hills*, we, the said commissioners, according to the directions of the said act of parliament, have assigned, allotted, and appointed, and do hereby assign, allot, and appoint the same, as a common pasture for the benefit of the following persons, whom we determine to be entitled to a right of common thereon, in respect of their several respective common right houses hereinafter mentioned, all situate, standing, and being in the town of *Mount Sorrel* aforesaid, that is to say, amongst other persons, to *John Place*, &c. And we further order, determine, and appoint, *that the said several persons in respect of the said common right houses or the*

occupiers thereof, shall for ever hereafter use and enjoy the said commonable place as a common pasture, EXCLUSIVE OF ALL OTHERS WHATSOEVER, and occupy the same in such manner and in such proportions, and subject to such orders and regulations in every respect, as are hereinafter, by us, the said commissioners, by this our award or instrument, ordered and appointed." Upon this award the plaintiff founded his claim, and it was contended that, by force of the inclosure act, and the award made pursuant thereto, the plaintiff and the other commoners were entitled to the exclusive enjoyment of *Mount Sorrell Hills,* without regard to the lord's manorial rights. On the part of the defendant it was insisted that the right of digging stone, was not affected by the inclosure act, but that it remained untouched, and that the commoners' right was subservient to that of the lord of the manor. It was proved by several witnesses that long before the inclosure act passed, and ever since then, the lord of the manor, or his lessees, had constantly exercised the right of digging stone and gravel in *Mount Sorrel Hills.* The learned judge was of opinion, that the lord's rights were untouched either by the statute or the award, and the jury having found, specially, that the lord had exercised and reserved the right to dig for stone in the commonable lands in question, both before and since the statute passed, a verdict was entered for the defendant, with liberty to the plaintiff to move to enter a verdict for one shilling damages.

Denman, C. S., now moved accordingly, and contended that the words of the statute and of the award, declaring that the commoners therein named shall have the common "exclusively of all other persons whatsoever," must, by necessary implication, be construed to exclude even the manorial rights of the lord himself. Any other construction would have the effect of completely destroying all rights of common thus vested by the statute exclusively in the plaintiff and other commoners; because if the lord has still the right of subverting the soil, and digging for stone to any extent

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he pleases, the pasturage will be absolutely worth nothing. The rights of the commoners to *Mount Sorrel Hills* do not now depend upon the reciprocal rights, as defined by common law, between lord and commoners, but as they have been ascertained by a competent tribunal. They must now rest upon the act of parliament and the award made by virtue thereof, and upon that footing it is clear that this action is maintainable. This case is distinguishable from *Bateson* v. *Green* (*a*) because it did not appear that the lord in that case had exercised the right of digging beyond the measure of any former period. But here, within the last few years, no less than four or five acres of the common had been subverted. If the lord can dig for as much stone as he thinks proper, it will be quite impossible for the commoners to enjoy that right of common so expressly secured to them by the statute. But independently of the statute and of the award, there must be some limit to the lord's right, for otherwise the rights of the commoners may be so much diminished as to be worth nothing.

ABBOTT, C. J. It appears, according to the facts proved in this case, that by the custom of this manor antecedent to the passing the act of 1771, the right of the commoners was subservient to the right of the lord; the right of the commoners to enjoy the pasture not preventing the lord from getting the stone, though the pasture might be diminished. That is the state of the facts antecedently to the passing of the statute, and I think the statute has not altered the lord's rights, or divested out of him any thing which he had before. There being a dispute as to what persons were entitled to a right of common on these hills, the commissioners named in the act are authorised to settle the dispute, and award to such persons as they think entitled, and declare that those persons shall have the enjoyment of the *pasture*, in exclusion of all other persons whatsoever. But it must

(*a*) 5 T. R. 411.

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be understood that the right of *pasture* was subservient to the manorial rights of the lord. The generality of the terms relied upon, will not deprive the lord of his rights; and it appears to me that the act left the rights of the commoners precisely where they stood before. At the time the act passed he was in the exercise of his right to dig for stone, and since that time he appears to have enjoyed it, and therefore I think there is no ground for disturbing the verdict.

BAYLEY, J.—It is admitted that the lord was in the habit of digging for stone, both before and after the act passed. That is therefore a contemporaneous exposition of the act, and shews that the lord's right to dig for stone continued. If the lord has constantly from time to time been in the habit of digging for stone, the presumption is, that the commoners continued to enjoy the right of common subject to the rights of the lord. The statute relied upon, would only give the plaintiff a right to the herbage, but it will not destroy the lord's right to minerals. The exercise of the lord's right may injure the herbage for a time, and so long as stones are wanted to mend the roads. To whom does the stone belong? If not to the plaintiff, it must belong to the lord; for it cannot be said that the statute in question can be construed so as to give the commoners the stone and minerals. If the lord were to exercise the right of taking stone wantonly, so as unnecessarily to interfere with the commoners' right of pasture, he would be liable to an action; but if he acts honestly and bonâ fide in getting stone as occasion requires, then I think he is not liable to any action.

The other judges concurred.

Rule refused.

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The KING v. The BAILIFFS and BURGESSES of the BOROUGH of ILCHESTER (a).

The bailiff and burgesses of an ancient borough, had been time immemorially lords of the manor, and owners of the Guildhall within the borough, and by a charter of *P.* and *M.* power was granted to them to hold manor courts in the Guildhall, twice in every year, as of ancient time, and until 1810 such courts had been time immemorially held. In that year commissioners, under an inclosure act, awarded to Lord H. all the said manor, with the rights, members, courts, view of frankpledge, *excepting to the bailiffs and burgesses the Guildhall*, &c. Held, that this exception did not exclude the new lord's right to hold his manor courts in the Guildhall.

THIS was a return to a mandamus which had issued to the defendants, commanding them to permit and suffer Sir *W. Talmash*, Bart., commonly called Lord *Huntingtower*, lord of the manor of *Ilchester*, and his steward of the said manor, to hold courts-leet and views of frankpledge for the said manor, within the Guildhall of the said Borough. The return stated "that the manor of *Ilchester* is, and from time immemorial has been, an ancient manor, and that Lord *Huntingtower*, for ten years last past, has been and now is lord of the said manor by virtue of the award hereinafter mentioned; that the lord of the said manor, for the time being, from time immemorial has holden, and still of right ought to hold, a court-leet and view of frankpledge in and for the said manor yearly, but that such court-leet, &c. of right ought not to be holden in the Guildhall of the borough; that the borough of *Ilchester* is an ancient borough, and that the inhabitants thereof, from time immemorial, have been a body politic and corporate by the name of the bailiff and burgesses of the borough of *Ilchester*, and were by letters patent, granted by *Philip* and *Mary* in the 3d and 4th years of their reign, incorporated by that name; that the bailiff and burgesses, from time immemorial, have been seised of the Guildhall, and have been used from thence hitherto to hold all corporate assemblies there, and to use the same for all corporate purposes; that the bailiff and burgesses, from time immemorial until the making of the said award, have been and were lords of the said manor, and have been used to hold courts-leet and views of frankpledge in and for the said manor, within the said Guildhall, and to have the exclusive use and enjoyment thereof; that *Philip* and *Mary*

(a) Vide ante, vol. ii. 721.

did, by their charter, grant to the said bailiff and burgesses of the said borough, and to their successors, to have within the said borough and the liberties and precincts of the same, for ever thereafter, view of frankpledge of all the burgesses, inhabitants, and resiants within the said borough, and the suburbs and liberties thereof, twice by the year, in the Guildhall of the said borough, to be holden at such days and times as to them should seem fit and necessary, as of ancient time had been used; that by an act of 47 G. 3., entitled an act for inclosing lands in the parishes of *Ilchester*, &c., after reciting that there was a certain commonable meadow called *Ilchester Mead*, and that the proprietors of the several parcels of land lying within the same, were entitled as in the said act mentioned, and that the bailiff and burgesses of the borough of *Ilchester* were lords of the manor of *Ilchester*, and of the soil of the said commonable meadow." It then set out the appointment of a commissioner under the inclosure act, with power to him to set out, allot, and award any lands, tenements, and hereditaments within the parish of *Ilchester*, in lieu of and in exchange for any other lands, &c. within that or any adjoining parish, provided that all such exchanges were specified in the award, and made with the consent of the owners of the lands exchanged, whether bodies politic, corporate, or collegiate, or other; and with directions to him to make and publish his award within certain specified periods. It then proceeded to state "that the commissioner on the 19th *June*, 1810, duly made and published his award, and did thereby set out, assign, and allot to Lord *Huntingtower*, all that the manor of *Ilchester* aforesaid, with the rights, members, courts, view of frankpledge, profits of tolls of all markets and fairs held within the borough of *Ilchester*, royalties and appurtenances to the same belonging (excepting to the said bailiff and burgesses, and their successors, the Guildhall, houses, buildings, court or garden belonging to the same, and the ground in front thereof inclosed with iron chains, and also except the allotments thereinbefore made to them, and also divers quit-

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rents, as in the award mentioned) which said manor, tolls, and quit-rents were late the property of the said bailiff and burgesses, and were by their consent assigned and allotted in exchange, and which said manor, tolls, and quit-rents were by the said award expressed to be thereby assigned and awarded to the said Lord *Huntingtower* in fee, in exchange for a fee-farm rent of 8*l.* in the said award mentioned, and for the land which he held in fee in the said commonable meadow given up by him, and thereinbefore assigned and awarded to the said bailiff and burgesses; and, that within the said manor and town of *Ilchester*, there were, and from thence hitherto have been and still are, divers public houses, the property of the said Lord *Huntingtower*, at which the courts-leet of the manor might have been and still may be duly and conveniently held, and near to the said Guildhall, wherefore we have not permitted and suffered the said Lord *Huntingtower*, the lord of the said manor of *Ilchester*, to hold his court-leet and view of frankpledge for the said manor, at and in the said Guildhall of the said borough, or restored to him the use of the said Guildhall for the purposes aforesaid."

D. F. Jones now moved to quash the return, and for a peremptory mandamus. By the common law, the lord has a right to hold his court in *any* convenient spot within the manor, unless either immemorial custom, or the provisions of a charter, have so far sanctioned the selection of a particular place, as to render it compulsory upon him to hold it there; in which case the right must, of necessity, extend to that particular place. Then, first, is there any ancient custom, which sanctions the holding the courts-leet of this manor in the Guildhall of the borough? It has been most satisfactorily shewn that there is, and that it obtained before, and at, and after, the creation of the charter. But it will be argued, that this is only a privilege, and may be waived, and *Rex* v. *The Mayor of Wigan* (*a*) will be relied on, as an an-

(*a*) 1 Wils. 76.

thority to shew, that the holding a court-leet in any other place than where it has usually been holden, is not a sufficient ground for a mandamus. That case, however, will not support the principle contended for. In the first place, the decision of the Court there, was not unanimous, for it was said by *Chapple*, J., "I can see no objection why we should not grant a rule to shew cause."—"But," adds the reporter, "the rule for a mandamus was denied by *Wright* and *Dennison*, Js., contrá *Chapple*, (absente C. J.) there never having been a precedent of such a rule." In the next place, the right there claimed was not founded either upon a charter, or upon an immemorial custom; the only argument adduced in support of it, being the necessity of it. Here, the right claimed is the subject of grant by an ancient charter, which, by that very grant, sanctioned a previous custom of holding the court-leet where the lord now claims to hold it, and which has ever since its creation been, in its turn, confirmed by an uniform adherence to that custom. The main objection there raised by the Court, namely, the absence of a precedent, is now likewise removed, because in *Rex* v. *The Corporation of Grantham* (a) a precedent is to be found, that being, as is shortly stated in the marginal note, a "mandamus to permit a court-leet and court-baron to be held in the accustomed place." It follows therefore, that whether there is, or is not, a necessity for holding the court-leet in the Guildhall, still the lord may hold it there if he chuses; he has the right to do so; and the probability certainly seems to be, that by doing so, he will best consult the convenience of all parties concerned. Besides, what is the intent and meaning of the exception in the award of the manor to Lord *Huntingtower*, "excepting to the bailiffs and burgesses the Guildhall?" The award is founded upon an exchange of property, and the exception was plainly intended to apply to the property in the building only, leaving unimpaired to the proprietor, every ancient right or privilege which he had previously possessed in the manor. The right of the lord to

(a) 2 Sir W. Bl. 716.

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hold his court-leet in the Guildhall, was one of those ancient rights and privileges; it was not affected by the clause excepting the Guildhall itself to the corporation; it is now legally vested in Lord *Huntingtower;* and he is entitled to the undisturbed exercise and enjoyment of it.

Adam, contrà. The return does not admit, nor is it intended to concede in argument, that the lord of this manor ever possessed the right, either by prescription or by charter, of holding his court-leet in the Guildhall of the borough; but if such a right ever existed, it is clear that it has now been abolished by the award made under the inclosure act. It is said, that it is a condition of the grant in the charter, that the lord shall hold his courts in the Guildhall. How does that appear? There is nothing in the charter which can be construed as selecting or assigning any particular place for the holding of these courts; all that it says is, that they shall be held "as of ancient times hath been." [*Bayley*, J. We have it as a fact that they have been held in the Guildhall, time immemorial, up to the very year when the charter was granted.] Undoubtedly; and *as a fact* it is admitted that they have been so held; but it is denied that they have been so held *as a right;* and that is the question before the Court. [*Bayley*, J. You mean to traverse the *present* right of the lord to hold his court in the Guildhall?] It is meant to traverse that right both past and present. *Rex* v. *Wigan* (*a*), so far as it goes, is an authority against the mandamus now applied for, and *Rex* v. *Grantham* (*b*) is so essentially distinct from the present case in many of its circumstances, that it forms no precedent for it, and cannot govern it. [*Abbott*, C. J. The award gives to Lord *Huntingtower* "all the said manor, with the rights, members, courts, views of frankpledge," &c. Was not the right of holding courts in the Guildhall one of those rights? If so, was it excepted out of the award, and given to the corporation? That is really the only question.] Even that ever was

(*a*) 1 Wils. 76. (*b*) 2 Sir W. Bl. 716.

a right vested in the corporation when they were the lords of the manor, and passed under the award to Lord *Huntingtower* when he became lord of the manor, still it is expressly excepted out of the grant to him, and reserved to the bailiffs and burgesses; because the words "excepting the Guildhall" must mean not the mere fabric of brick or stone, but the rights and privileges and powers which arose out of it, or were in any manner associated with it.

Jones, in reply, was stopped by the Court.

Abbott, C. J.—It is not necessary for us to decide whether the court leet can legally be held in any other place than the Guildhall. At some future day it may become matter of necessity or convenience to hold it elsewhere, and it is better therefore not to prejudice that question by any declaration of our opinion upon it now, when that opinion does not seem called for by the case immediately before us. The return before the Court states certain facts from which it is perfectly clear, as it was also a necessary consequence from the nature of the grant in the charter, that from time immemorial up to the date of the charter, and from the date of the charter up to the period of the inclosure act, the Court was held in the Guildhall. Then look at the language of the award. It gives to Lord *Huntingtower* "all the said manor, with the rights, members, courts, views of frank-pledge," &c. Construing those words in their fair and ordinary sense, it is impossible to doubt but that the right of holding the court-leet in the Guildhall passed to the new lord, with the manor and the rights appertaining to it; and then the only remaining question is, whether the subsequent exception includes that right, so as to withhold it from the lord and vest it in the corporation. It is "excepting to the bailiffs and burgesses, the Guildhall." In my opinion the fullest extent of that clause is, to reserve to the corporation the property in the Guildhall as a building, but not to restrain the lord's right of entering and using it

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as a court; and therefore it seems to me that that right not being excepted, still vests in the lord, and that he is entitled to our interference to protect him in its exercise and enjoyment. I am, therefore, of opinion that this return is insufficient, and that a peremptory mandamus, in the form prayed for, ought to issue.

Bayley, J.—I think this return must be quashed for insufficiency. In order to judge of the sufficiency of a return, we must look at the allegations set out in the mandamus, and then we shall see how far the one is an adequate answer to the other. Now the mandamus alleges, first, that the lords of the manor had from time immemorial, of right, held their courts-leet in the Guildhall of the borough; and second, that the lord of the manor still, of right, ought to hold his court-leet there. The second of these allegations springs out of the first as a necessary consequence of it, and the short and conclusive answer to the writ would have been simply to traverse them both. That, however, the defendants have not done; they have traversed only the present right; and in this respect it seems to me that the return is, in point of form, clearly insufficient and void. Then let us look at the facts of this case. There are none which go to disprove any part of the right claimed, past, or present; on the contrary, they amount in substance to an admission of the former right, and therefore must inevitably admit the present also, unless there is any thing in the award which puts that upon a different footing. I am of opinion that the award has no such operation, but that the excepting clause applies to the Guildhall exclusively as a building, without at all affecting the right of the lord to hold his court within its walls. The exception is nothing more than a reservation of the property in the Guildhall itself to the bailiffs and burgesses, which would otherwise have passed as parcel of the manor, but reserving it to them subject to those rights and privileges which are incident to a court-leet.

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Holroyd, J.—I have no doubt that Lord *Huntingtower*, as lord of the manor, has a right to hold his courts in the Guildhall of the borough. The corporation clearly had that right while they were lords of the manor; they had it as the lords, and independently of the right in the building and the soil, which vested in them in their corporate character; and it passed to the new lord in the same capacity, with the other members and rights of the manor, by the award made under the inclosure act. It seems to me, not only that he has the right of holding his courts in the Guildhall, but that he has no right to hold them elsewhere, because the charter, which was only a confirmation of the ancient custom, prescribed they should be held "as of ancient times hath been," which is in the Guildhall. The exception in the award evidently does no more than reserve to the corporation the ownership of the soil; the right to use the building, which was incident to the lordship of the manor, passed with the manor to the lord, and remains vested in, and to be exercised by him, both as a duty and as a privilege.

Littledale, J.—The return does not answer the allegations of the mandamus; it merely endeavours to evade them, by alluding to the transfer of the manor to the new lord, and the exception of the Guildhall to themselves. But the corporation have granted the manor to Lord *Huntingtower* in the same condition as they held it themselves, and therefore, subject to the custom for holding the court in the Guildhall. The manor is granted with all its appurtenances, and this is clearly one. The privilege is part of the grant; the place where the court is to be held is parcel of the court itself, and is plainly designated [illegible] the charter. As to the exception, it is, as has already been said, an exception of the right in the soil only, and not of the right of using the building.

Rule absolute for quashing the return, and for a peremptory mandamus.

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Saturday, May 22.

The KING v. The INHABITANTS of IDDESLEIGH.

Where an apprentice served his master for six years and nine months in the parish of *I.* under indentures which expired at *Midsummer*-day, and then went into the parish of *D.* and hired himself for a month to another master at weekly wages, to which service the first master gave his consent; and at the end of that month, the pauper entered into a fresh agreement with the second master at the like wages, and continued to serve under that agreement until the 7th *June*, when he was called out to serve in the Local Militia, which he did for a fortnight and returned to his second master on the 21st *June* and made a new agreement to serve him as before at sixpence a day, and while in that service he slept from the 21st to the 24th of *June* inclusive in the parish of *I.*: Held, that whether the service with the second master during the remainder of the term was with the consent of the first or not, still the pauper's sleeping for the last three nights in *I.* settled him in that parish, though the first master did not know of his sleeping there.

BY an order of two Justices *Samuel Rattenbury*, *Ann* his wife, and *Mary* their daughter, were removed from the parish of *Iddesleigh* to the parish of *Dowland*, both in the county of *Devon*. On appeal, the Sessions quashed the order, subject to the opinion of this Court, on the following case:

The pauper was bound an apprentice in 1806, by parish indentures, to *John Arnold*, in the respondent parish; which indentures expired on the 24th *June*, 1813. He resided in the same parish, working with his master, from the commencement of his apprenticeship until *Lady*-day, 1813, when he left him, and entered into an agreement with *Thomas Weeks*, in the appellant parish, to serve him for a month, at 2*s.* 6*d.* per week. After this agreement was made, and before the pauper went into *Weeks*'s service, *Arnold* saw *Weeks* and consented to the pauper's service with him; and the pauper then went for the first time to reside in the appellant parish. At the expiration of the first month the pauper and *Weeks* came to another agreement for a second month at 3*s.* 6*d.* a week, and the pauper continued to work with *Weeks* at the same rate of wages, and to reside in the appellant parish until the 7th *June*, when he left *Weeks* in consequence of being called out to serve in the Local Militia in a third parish. Having served a fortnight in the militia, he returned on the 21st *June* to *Weeks* and made a new agreement to serve him in the same capacity as before at 6*d.* a day, and while in *Weeks*'s service from the 21st *June* including that day, the pauper slept continually for two or three months at his mother's in the respondent parish.

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The question for the opinion of the Court is whether the pauper was settled in the parish of *Dowland*.

Crowder in support of the order of Sessions was stopped, the Court intimating that even if there was a consent on the part of the first master to the pauper's service with the second after he left the militia, his sleeping the last three nights in the parish of *Iddesleigh*, though without the knowledge of *Arnold*, would be a service under the indenture in that parish, and so confer a settlement there.

Marryatt and *Fraser*, contrà. This case falls within the decision in *Rex* v. *Smarden* (*a*). There, the apprentice, after serving most of his time with his master in *S*., obtained a subsequent settlement in *H*., by serving another master there for forty days, by the direction of his first master, who was to receive 3*s*. per week from the second master for such service; and being then dismissed by the second master, the apprentice, unknown to the first master, and without any intention of returning into his service again, lodged for one night in *S*., and then went into a third parish, and worked for himself a month, when, his term having expired, he returned to *S*., and went with his first master to a common friend, with whom the indenture had been deposited, to take it up; which he did, and carried it away. It was held that the settlement was not brought back to *S*. by such *casual* lodging of the apprentice one night in the parish of his master without any resumption of, or even intention to resume the service with his first master under the indenture. [*Abbott*, C. J. That case is distinguishable from the present in two particulars; first, the second service was entered upon with the consent of the first master; and second, the fact of the apprentice sleeping one night in the parish of the first master, was unknown to him, and was a casual act, not done with the intention of resuming the service under the indenture.]

(*a*) 13 East, 452.

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There is a general consent of the first master here to the pauper's entering into the second service, and that is sufficient. [*Abbott*, C. J. Still the pauper sleeping the last three nights of his term in the parish of *Iddesleigh* removes the settlement to that parish, because he was then serving under the indenture.]

Abbott, C. J.—I think the Sessions have determined this case rightly. The pauper had made an agreement to serve *Weeks* in the parish of *Dowland*, for a month at 2*s*. 6*d*. per week. The latter communicates this circumstance to the former master, who consents to the service, and for that purpose the pauper goes into, and resides in the appellant parish, under that contract. At the expiration of that month the pauper was at liberty to quit, and *Weeks* was at liberty to part with him. Then they came to another agreement for another month at 3*s*. 6*d*. per week, and the pauper remains in the appellant parish until he goes into the militia. At the end of a fortnight he returns to *Weeks* and enters into a third agreement at 6*d*. a day; but it does not appear that the agreement was for any specific length of time. The Sessions seem to have been of opinion, that there was either a consent of the former master specially or generally for the pauper to serve *Weeks*. If it was a special consent, then it must be a consent to the terms of service for which the parties had agreed previously to the return of the pauper to *Weeks*'s service; and if it be so considered, then there would be only one service, with the assent of the original master. But on the other hand if it was a general assent that the pauper should serve *Weeks* during the remainder of the term, then, though the service during the last three days was in the parish of *Dowland*, still that would not confer a settlement, for during the nights of those three days he slept in *Iddesleigh*, and therefore whatever view is taken of the case, whether we consider it as a special or general assent, it seems to me that no settlement was gained in *Dowland*.

Bayley, J.—I think the Sessions did right in forming the conclusion to which they came. It was for them to decide whether the first consent was general or definite. On whatever ground they decided, their decision is correct, the pauper having slept during the last three nights in the parish of *Iddesleigh*. It is said that the sleeping must be connected with the service. To that I accede; but it must be a sleeping in the parish in which the service is. It has been decided over and over again in the case of a hired servant, that sleeping the last night in the parish in which the pauper is hired will determine the settlement, though there is no work done in that parish (*a*). Though the pauper in this case slept the last three nights in *Iddesleigh* without the first master's knowledge, that will make no difference.

Holroyd, and Littledale, Js.—concurred.

Rule discharged.

(*a*) 4 Burn, 402. 3. 4. & 10. See 8 T. R. 108. 4 Burn, 436. Id. 422. 430. 412. 417.

The King *v.* The Inhabitants of Bathwick.

Saturday, May 22.

Where a pauper hired a house under an unstampt written agreement: Held, that the Sessions might look at it to see whether it related to the premises in question, in order to determine upon the admissibility of parol evidence on the same subject, with a view to raise the presumption of a contract which would confer a settlement. *Quære*, Whether any thing but an express contract for the hire of a house for a whole year will satisfy the requisites of the statute 59 *G.* 3. c. 50.

TWO Justices, by their order, removed *Phœbe*, the wife of *John Jacobs*, and her five children, from the parish of *Walcot* to the parish of *Bathwick*, both in the county of *Somerset*. On appeal the Sessions quashed the order, subject to the opinion of this court on the following case:—

The pauper's husband, *John Jacobs*, took of *John Hill* a cottage, No. 1, *Argyle Place*, in the parish of *Bathwick*, and lived in it with his family from about the middle of *October*, 1819, until the 21st *December*, 1821. He paid the

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whole rent, amounting in all to 29*l.*, in the following manner:—On the 8th *January*, 1820, three pounds were paid for rent up to the 21st *December*, and the remainder by quarterly payments of 3*l.* 5*s.* each. The rent was generally received by *Charlotte* the wife of *John Hill*, and the receipts, duly stampt, hereinafter set out, were delivered by her to *John Jacobs* or his wife at the time the rent was received. *Charlotte Hill* could neither read nor write, nor did it appear by whom the several receipts were written. The former tenant of the cottage died shortly after *Michaelmas*, 1819, soon after which a conversation took place between *John Hill* and *John Jacobs* relating to the terms upon which the cottage was to be taken, which were afterwards, and before *Jacobs* took possession, reduced into writing in the following form:—"I *John Hill* do hereby agree with Mr. *Jacobs* to let him that cottage or tenement, being No. 1, in *Argyle Place*, at per week, the sum of 5*s.*; the rent to commence on *Wednesday* next. *John Hill. John Jacobs. October* 6th, 1819." This paper was not stampt nor offered in evidence, but was produced by *Charlotte Hill*, in whose custody it had been kept, and was inspected by the court to see to what it referred. Neither *Charlotte Hill*, nor the pauper, knew of any fresh agreement after the cottage was first taken. *John Hill* died between the months of *April* and *July*, 1820. *John Jacobs* had, before the removal of the pauper and family, absconded and left them chargeable to the parish of *Walcot*, and the pauper had not seen him for a year before the time of hearing the appeal. Every other requisite to the validity of the removal and of the settlement in *Bathwick*, as well under the stat. 59 *Geo.* 3. c. 50. as otherwise, was established, except the bonâ fide hiring of the house for the term of one whole year; and whether the court of Quarter Sessions ought to have decided that this was established by the facts above stated, is the question for the opinion of the Court.

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Schedule of the receipts referred to in the case.

Received of Mr. *Jacobs* the sum of 3*l.* for rent due on the 21st day of *December* last past, by me *John Hill.* *January* 8th, 1820.

Received of Mr. *Jacobs* the sum of 3*l.* 5*s.* for one quarter's rent due at *Lady day* last, by me *John Hill.* *April* 17th, 1820.

Received of Mr. *Jacobs* the sum of 3*l.* 5*s.* for one quarter's rent due at *Midsummer* last. *Charlotte Hill.* *July* 27th, 1820.

November 2d, 1820. Received of Mr. *Jacobs* the sum of 3*l.* 5*s.* for one quarter's rent due at *Michaelmas* last. *Charlotte Hill.*

December 21st, 1820. Received of Mr. *Jacobs* the sum of 3*l.* 5*s.* one quarter's rent due *St. Thomas'* day last. *Charlotte Hill.*

Received, 21st *July*, 1821, of Mr. *Jacobs*, 3*l.* 5*s.* for one quarter's rent due *Midsummer* last. *C. Hill.*

Received of *John Jacobs* the sum of 3*l.* 5*s.* for one quarter's rent due this day, 29th *September*, 1821, by *C. Hill.*

Erskine in support of the order of Sessions. By the 59 *Geo.* 3. c. 50., in order to gain a settlement by renting a tenement, there must be a bonâ fide hiring of the premises for the term of one whole year. The case finds that every requisite of the statute was complied with, except the bonâ fide taking of the house for a whole year; and the question is whether the Sessions have properly drawn a conclusion against a yearly tenancy. In any view of the case it is clear that the Sessions have drawn the right conclusion. First, it being proved that the terms on which the pauper's husband originally took the tenement, were reduced into writing, it was not competent for the Sessions to go into presumptive evidence of the hiring, so as to constitute a tenancy within the meaning of the statute, because the court could not raise a presumption where the fact of an existing agreement was proved (*a*). Second,

(*a*) See 2 B. & A. 478.

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supposing the inadmissibility of the agreement for want of a stamp would let in presumptive evidence, still such evidence would not be sufficient, because since the statute, presumptive tenancies cannot be supported; an actual taking for a year is required, "any thing in any act or acts, or any construction of or implication from any act or acts, or any usage or custom to the contrary, in any wise notwithstanding:" and Third, admitting that evidence of a presumptive tenancy might be received, still the evidence in this case rebuts that presumption. The occupation commenced in the middle of a quarter, and therefore, in point of law, the tenancy would not commence until *Christmas*, 1819, and in fact ended at *Michaelmas* day, 1821. There was no proof of any notice to quit, and the language of all the receipts after the first, imports only a quarterly taking, because they all speak of rent "due" at a particular quarter. In the case of a tenancy from year to year, there must be half a year's notice to quit at the end of a year, *Right* v. *Derby* (a), and on a quarterly letting, to quit at a quarter's notice, the quarter must end with a year of the tenancy, *Doe* v. *Donovan* (b). Here the commencement of the occupation is in the fraction of a quarter, and the first payment is for less than a quarter, and consequently repels the presumption of an agreement for a tenancy from *Michaelmas*, 1819. Where a tenant entered in the middle of a quarter, and afterwards paid from that time to the beginning of a succeeding regular quarter, Lord *Ellenborough*, C.J. held that the tenancy commenced from the quarter succeeding his entering. *Doe* v. *Johnson* (c). Here there was no proof of notice to quit, nor of a quitting at the end of the year, and therefore every circumstance in the case rebuts the presumption of a yearly taking and renting. *Rex* v. *Pendleton* (d) is an authority for shewing that the Sessions might look at the unstampt agreement set out in this case, in order to guide them in receiving other evidence as to the nature of the contract be-

(a) 1 T. R. 159.
(b) 1 Taunt 555.
(c) 6 Esp. 10.
(d) 15 East, 449.

tween the parties, although it could not be received as evidence of the agreement itself. The agreement, could it have been received, would have put the question completely out of doubt, because it would shew a letting by the week; but independently of any consideration of the agreement, the circumstances of the case justify the conclusion drawn by the Sessions. It was their peculiar province to draw the conclusion from the facts (a), and having drawn the right conclusion, the order must be affirmed.

Jeremy, on the same side, was stopt by the Court. [*Abbott*, C. J. Can we raise an implication of hiring for a year, by the payment of rent, when we are in a state of absolute uncertainty as to what the agreement is? If we read the written contract, it is a weekly hiring; but if we are not at liberty to read it, can we say that it is any thing but a presumptive hiring; and then, is it a hiring in compliance with the statute? We will hear the other side.]

C. F. Williams and *Moody*, contrà. The insertion of the unstampt agreement into the case, after the Sessions had decided that it was inadmissible in evidence, is rather an anomalous proceeding, and cannot fail to have an influence in the decision of this question, which ought to be considered as if no such agreement had ever existed. [*Abbott*, C. J. The Court has a right to know that such a paper was produced, although inadmissible in evidence for want of a stamp. *Bayley*, J. When a case is before a judge and jury at Nisi Prius, the judge has a right to look at a paper produced, though not admissible in evidence, in order that he may see how far parol evidence afterwards offered, may be received or rejected. The Justices at Sessions fill the double character of judges and jurors, and, in their character of judges, they have a right to look at a paper of this description, and remit it to us in their

(a) *Rex* v. *Maidstone*, [illegible] East, 550. and see the observations of *Le Blanc*, J. in that case

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double character. In our character of judges only, have we not a right to see the paper also?] Admitting that the Court has a right to see the paper, still, as it cannot be acted upon as legal evidence, it must be taken to be an instrument, the contents of which are unknown, and consequently it is left open to the Court to determine, as matter of presumption arising from other evidence, what the relation between the parties was in point of law(a). [*Bayley*, J. Are you at liberty to raise a presumption of fact dehors the written evidence?] If there are circumstances in the case which raise a presumption, independently of the original agreement, the Court will give effect to them without regard to any other evidence. Now, assuming that the written agreement imports a weekly hiring, still if the receipts which are set out in the case are totally repugnant to a hiring of that description, the Court will not presume that the hiring was weekly, but, on the contrary, will rather conclude that it was yearly. It may be true, that when the tenancy originally commenced it was weekly, but non constat that it continued so. The Court must be satisfied by the clearest evidence, that the holding during the time in dispute was weekly, for otherwise the presumption of law arising from the evidence, is that the hiring was yearly. It does not follow because there had been a written agreement for a weekly tenancy, during a certain period, that it continued in force during all the time the pauper's husband was in the occupation of the house. The facts of the case raise a strong presumption that the original agreement was in operation for a definite period, at the end of which, a new agreement was entered into. The receipts shew that there was a yearly tenancy commencing on the 21st *December*, 1819, after which time there were quarterly receipts, respectively stating the rent to be due at the regular quarter days. The first receipt is for the fractional time during which the pauper's husband occupied, namely,

(a) See *Rex* v. *Castleton*, 6 T. R. 236. and *Rippener* v. *Wright*, 2 B. & A. 478.

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until the 21st *December*; after which, the payments are regular multiples of a year, until the tenancy ends at the *Michaelmas* quarter in 1821. In *Richardson* v. *Langridge* (*a*), *Chambre*, J. says, "if the lessor accepts yearly rent, or rent measured by any aliquot part of a year, the Courts have said, that is evidence of a taking for a year. The Courts have a great inclination to make every tenancy a holding from year to year, if they can find any foundation for it." Here all the admissible evidence shews a yearly tenancy, and therefore the Sessions ought to have found the fact of a bonâ fide taking for a year, so as to confer a settlement. As the Justices have not merely stated a conclusion from the evidence before them, but have also stated the premises from which that conclusion is drawn, this Court is not precluded from examining the propriety of their determination; *Rex* v. *Tedford* (*b*), *Rex* v. *Whittlebury* (*c*), in which latter case Lord *Kenyon*, C. J. said, "the case of *Rex* v. *Tedford* is a very considerable authority to shew, that where the Sessions state all the facts, as well as their determination, we are not precluded from examining the conclusion drawn by them from the facts." Upon these authorities it is clear, first, that the Court will feel themselves at liberty to give an opinion upon this case; and second, that that opinion must be, that the Sessions have been mistaken in point of law, and consequently that their order, quashing the order of removal, must itself be quashed. They cited *Doe* v. *Morris* (*d*), and *Rex* v. *Castleton* (*e*).

ABBOTT, C. J.—This case arises on the statute 59 *Geo*. 3. c. 50. by which it is enacted, that no settlement shall be gained by the renting of any tenement, unless there be a bonâ fide hiring for the sum of £10 a year, at the least, for the term of one whole year. The question is, whether we

(*a*) 4 Taunt. 132.
(*b*) Burr. S. C. 57.
(*c*) 6 T. R. 464. vide *Rex* v. *Brighthelmstone*, ante, vol. i. 74. *Rex* v. *North Collingham*, ante, vol. i. 393.
(*d*) 12 East, 237.
(*e*) Burr. S. C. 569.

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can now tell the Court of Quarter Sessions, who have decided that there was no such hiring, that they ought to have decided that there was, upon the facts which they have set forth as having been proved in evidence. I am not able to say that they ought so to have decided. I do not however go the length of saying, that if they had so decided, I should have felt myself at liberty to reverse their decision, but I cannot say that they ought so to have decided. Then what are the facts? It appeared that the original hiring of the cottage was under a written contract. The contents of the contract being unknown, are we to say that it did not embrace the whole period of the occupation of the tenement? There is certainly no direct evidence that it did not; and without direct evidence to the contrary, it is rather to be presumed that the contract under which the occupation commenced, continued to the end of the tenancy. What can we suppose the contract to be, without regard to the agreement? Consistently with the evidence it may have been a contract for a weekly tenancy. Although the sums paid are not exact multiples, at so much per week, yet they come so near, that the parties might agree so to treat them. But I cannot say, upon this evidence, that the contract was not this; that the pauper's husband should pay 3*l.* for the broken period up to the 21st *December*, (*St. Thomas*'s Day, and which I take to be one of the usual quarter days in that part of the country,) and so account for his rent every quarter-day afterwards by paying 3*l.* 5*s.* Not being able to say that such was not the contract, (and if it was, certainly no settlement would be gained,) I cannot say that the Sessions ought to have decided otherwise than they have done.

Bayley, J.—The burthen of proof lay in this case upon the removing parish. It was for them to make out to the satisfaction of the Justices, that there was a yearly hiring. If the Sessions were in doubt, they have done right in quashing the order of removal; and we are not at liberty to

say they have done wrong, unless we can take upon ourselves to decide, that they were bound to hold that there was a yearly hiring. In the first place the Sessions were at liberty to look at the written contract or not, according to circumstances. They were not at liberty to act upon it as evidence if it was not admissible, but if it related to the premises in question, they might look at it if they thought proper. It appears from the evidence in the case that there was a written contract applicable to a tenancy between the parties which was not admissible for want of a stamp. As soon as the fact is established that there is a written contract, or so long as it remains even in dubio whether such a contract exists, all parol evidence must be entirely excluded. That has been decided over and over again. It was so decided in *Rippener* v. *Wright* (a); and I remember, in the case of an action for use and occupation tried before Lord *Eldon* in C. P. when it appeared, on cross-examination, that there was a written agreement between the parties which was not produced, his Lordship directed a nonsuit. But if we look at the written contract, which we are at liberty to do, with a view of interpreting the effect of the rest of the evidence, then we see that it is a hiring at five shillings per week, evidently shewing a weekly hiring. What is the effect of the receipts given in evidence? It is perfectly consistent with them that the hiring might have been weekly, but that the rent was to be paid quarterly. The first receipt certainly shews a variation from the terms contained in the written agreement, because according to that there was only a period of eleven weeks from the time it bears date until the 21st *December*, which would make 55*s.* as the sum due, though the sum paid was in fact 60*s.* There might have been some reason or other for this deviation from the terms of the written contract, which we cannot discover, and with respect to which we are at least left in doubt. The parties might have some particular object in view in making that arrangement as to the broken

(a) 2 B. & A. 478.

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quarter; but however that may be, I am by no means prepared to say that the Sessions have done wrong in coming to the conclusion which they have formed.

Holroyd, J.—I am of the same opinion. I think that no evidence was admissible at the Sessions which would have the effect of contravening the terms of the agreement. The Sessions were at liberty certainly to look at the agreement, but only for the purpose of seeing whether it related to the premises in question. The agreement being inadmissible as evidence, we are not supposed to know its terms, nor would parol evidence of its contents be admissible. Undoubtedly it might have been shewn from subsequent acts that the agreement had been put an end to; but there is no evidence to that effect in this case. There is nothing in the receipts to shew any variation from the original agreement. Without the agreement, it is impossible for us to say whether it was a weekly, quarterly, or yearly tenancy, and therefore we cannot say that the Sessions have done wrong in holding that this was not a bonâ fide hiring for a year within the terms of the statute.

Littledale, J. concurred.

Order of Sessions confirmed.

Monday, May 24.

Const v. Phillips.

The Court refused to set aside an annuity granted 18 years since, on the ground that the Christian names of the subscribing witnesses to the warrant of attorney were not set out at length in the memorial thereof, in pursuance of the 17 Geo. 3. c. 26.

R. BAYLY, on a former day, obtained a rule to shew cause why the warrant of attorney given in this case for securing the payment of an annuity of 220*l.*, and the judgment and all subsequent proceedings thereon, should not be set aside on the ground that the memorial contained only the initials, instead of setting out at length the Christian

names, of the subscribing witnesses to the warrant of attorney, and he relied upon *Darwin* v. *Lincoln* (*a*), *Smith* v. *Pritchard* (*b*), and *Cheek* v. *Jefferies* (*c*). In the memorial of the warrant of attorney, the witnesses whose names were in question, were described as "*G. H. Browne*, of *Lincoln's Inn*, in the county of *Middlesex*, gentleman," and "*E. A. Browne*." The annuity was granted in 1806, and in 1807 had been the subject of proceedings in the Court of Chancery.

Marryat now shewed cause against the rule, and contended, first, that as this annuity had been granted before the passing of the 53 *Geo.* 3. c. 141. the provisions of that statute did not extend, nor did the decisions thereon apply to the present case; and second, that if the objection were available, it ought to have been taken in the Court of Chancery in the year 1807. The 17 *Geo.* 3. c. 26. does not contain the same provisions as are found in 53 *Geo.* 3. c. 141. In the former, all that is required is, that the memorial shall contain, among other things, the *name* (in the singular number) of all the parties, and for whom any of them are trustees, and of all the witnesses; but the latter directs that the names of all the witnesses shall be set out in the memorial, and there is a form given by that act, which is not prescribed in the other. If this had ever been considered a valid objection to an annuity granted prior to the 53 *Geo.* 3. it must frequently have occurred; but it is remarkable that it was not until after the passing of the latter act that it was ever suggested. Admitting, however, the validity of the objection, it is one which might have been taken in Chancery, and being now suggested for the first time, after a lapse of eighteen years, the Court in the exercise of its discretion, will not suffer it to prevail, especially as it is now stated on affidavit, that there are some erasures in the memorial, and that, in the deponent's belief, the Christian names of the sub-

(*a*) 5 B. & A. 444.
(*b*) Ante, vol. i. 374.
(*c*) Ante, vol. iii. 185.

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scribing witnesses were originally written at full length in the memorial.

Bayly in support of the rule urged, that the lateness of the objection was no ground why the Court should not interfere, because instances were to be found in which, after a lapse of twenty years, the Courts had set aside annuities for similar objections (*a*). It did not follow that there was any objection to the memorial at the time the annuity was the subject of discussion in Chancery; this objection might have occurred since. It was not because objections of this nature had never arisen until after the passing of 53 *G.* 3. that they ought not now to receive the sanction of the Court. The language of the 17 *G.* 3. was nearly similar to that of the 53 *G.* 3. and the decisions upon the latter statute are equally applicable to annuities granted under the former act.

ABBOTT, C. J.—Of late years, the language of the 17 *G.* 3. c. 26. has been construed as not being imperative on the Court absolutely to vacate annuities for objections of this nature. The object of the present application is to set aside this annuity; but I think that, after the lapse of so many years, it is incumbent on the Court to exercise that discretion which it has, in latter years, been in the habit of exercising. It is suggested here, that there appear to be some erasures in the memorial. Now if that be so, it affords a still stronger reason why, after an interval of eighteen years, the Court ought not to entertain the objection. If an application of this description had been made soon after the annuity was granted, it would be in the power of the grantee to give a full explanation of all the circumstances under which the annuity was granted; but being called upon at the end of eighteen years, he cannot inform the Court respecting them with so much certainty. The witnesses may be dead, and it may be wholly out of the power of the

(*a*) *Exparte Mackreth*, 2 East, 563. and *Van Braam* v. *Isaacs*, 1 B. & P. 461.

parties interested in supporting the annuity, to give a satisfactory explanation of the transaction at the end of so many years. I think we ought not in this case to interfere, especially as this objection, if valid, might have been taken in the Court of Chancery.

BAYLEY, J.—I am of the same opinion. This is a very critical objection, and considering that it is not taken until eighteen years after the annuity was granted, and when all memory of the transaction may have been lost, I think it deserves little encouragement, particularly as there is some degree of uncertainty, whether the memorial was not originally correct, and in strict compliance with the provisions of the Annuity Act. Under such circumstances, it would be a great deal too much to expect us to set aside this annuity.

HOLROYD, J. and LITTLEDALE, J. concurred.

Rule discharged.

PHILLIPS *v.* J. R. WHITMORE.

Monday, May 24.

Where a defendant was ordered by the Insolvent Debtors' Court to remain in custody at the suit of certain creditors by name, until sixteen months had expired, and being found at large within six months: Held, under 3 G. 4. c. 123. that any of his scheduled creditors, though not named in the order, might arrest him and cause him to be confined until the sixteen months were expired.

THIS was a rule calling upon the plaintiff to shew cause why the bill of *Middlesex*, issued in this cause, and the bail bond given by the defendant, should not be set aside with costs. On shewing cause, the facts disclosed were these: The defendant having petitioned the Insolvent Debtors' Court for relief, under the 1 *Geo.* 4. c. 119. and 3 *Geo.* 4. c. 123. was, on the hearing of his petition, ordered to be discharged forthwith, as to all the debts specified in his schedule, except nine, and with respect to those, the Commissioners further ordered that he should not be discharged, until he should have been in custody at the suit of the several persons to whom those debts were due, some or one of them, for the period of sixteen calendar months, to be computed from the day of filing his petition. Within six months

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after this order was made, the defendant was found at large; whereupon the plaintiff, one of his creditors for 17*l.* 17*s.*, and with respect to whose debt the defendant was ordered to be discharged forthwith, caused the defendant to be arrested on a bill of *Middlesex*, and held to bail. The question now was, whether the defendant could be arrested at the suit of the plaintiff, though found at large before the sixteen months had expired.

Chitty for the defendant contended, that although the defendant might be liable to be arrested again, if found at large before the sixteen months had expired, by any of the creditors at whose suit he was ordered to remain in custody, yet he could not be arrested by the plaintiff, whose debt was included in the schedule, and with respect to which the defendant was adjudged by the Insolvent Court to be discharged forthwith.

Abraham contrà, relied upon the words of sec. 6. of 3 *Geo.* 4. c. 123. and urged that it was competent to any of the creditors named in the schedule, to arrest the defendant if he was found at large before the expiration of the sixteen months, though not named in the order of adjudication.

BAYLEY, J.—I am of opinion that this defendant was liable to be arrested for this debt, though the plaintiff was not one of the creditors at whose suit he was ordered to be detained until sixteen months, from the time of filing his petition, had expired. By section 6. of 3 *Geo.* 4. c. 123. it is enacted, that in all cases where it shall appear to the Insolvent Debtors' Court, that any prisoner shall have done or committed any act for which the Court is by 1 *Geo.* 4. c. 119. authorized to order, that such prisoner shall not be discharged out of custody by virtue of that act, or receive or be entitled to any protection, until he shall have been in custody at the suit of some one or more of the persons who were creditors at the time of petitioning the Court, and from

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whose claims he shall be discharged by the judgment of the Court, for a period or periods not exceeding three years in the whole, the said Court may adjudicate thereon, in the words of the said act, without naming any such one or more creditor or creditors in such adjudication; "and thereupon the said insolvent shall, under such adjudication, be subject and liable to be detained in prison by his then detaining creditor or creditors, and to be arrested or charged in custody by any of the other creditors in his schedule, until he shall have been in custody for such period or periods in the whole, as shall be specified by such adjudication." It is clear, therefore, from the language of the statute, that whether the creditor be named or not named in the adjudication of the Court, that can make no difference as to the liability of the prisoner to be arrested or charged in custody, until the period specified in the adjudication shall have expired. Nothing depends upon the form of the adjudication. I think every one of the defendant's creditors named in the schedule has a right to say, that he shall remain in custody for sixteen months.

HOLROYD, J.—I am of the same opinion. The Insolvent Debtors' Court being of opinion that the defendant had misconducted himself towards certain of his creditors, adjudicate that he shall not be discharged until sixteen months are expired. Now, though the defendant may not have misconducted himself towards his other creditors, still they have a right to see the judgment of the Court enforced. I think the words of the 6th section are conclusive, and therefore this rule must be discharged.

ABBOTT, C. J. and LITTLEDALE, J. concurred.

Rule discharged without costs (*a*).

(*a*) Vide *Edwards* v. *Tucker*, ante, 216.

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Wednesday, May 26.

LEE et Ux. v. GOODLAD.

Where a defendant in an action brought in an inferior Court for *defamation*, after entering a common appearance and suffering judgment by default, removed the proceedings by Certiorari into this Court, without entering into any recognizance: Held, that the case was within 51 G. 3. c. 124. s. 3. and the Court awarded a procedendo for the defendant's default in not entering into the recognizance thereby required, the damages being laid only at 13*l*.

THIS was a rule Nisi for a procedendo, obtained upon the affidavit of the plaintiff's attorney, which stated, "that on the 29th *October* last, deponent entered an action and plaint in the Sheriff's Court of *Newcastle*, at the suit of the plaintiffs against the defendant for defamation, in which the damages were laid at 13*l*.; that on the 31st *October*, the defendant was served with a copy of the certificate of the entry of the action, and on the 5th *November* last, deponent declared the cause in the Court; that shortly afterwards, Mr. *Ingledew*, as attorney for the defendant, entered a common appearance to the action, whereupon deponent filed a declaration wherein the cause of action was set forth, and the damages laid at 13*l*.; that the defendant not having pleaded to the declaration, interlocutory judgment was had against him, and the plaintiffs were about to assess their damages on the 30th *January* last, when the defendant's attorney lodged a writ of Certiorari in the cause which was allowed; that deponent has searched in the office of the Prothonotary of the said Sheriff's Court, and that there does not appear to have been any recognizance entered into by the defendant, or any person on his behalf, either at the time of the allowance of the writ of Certiorari, or since, as the statute 51 *G*. 3. c. 124. s. 3. requires, where the cause of action does not amount to 15*l*. or upwards."

Tindal shewed cause, upon an affidavit, stating that the Certiorari was issued on the 28th *January* last, returnable on the 12th *February* last, and that the return of the sheriff had been filed in this Court; and he contended that the rule must be discharged on two grounds: first, because the statute did not require a recognizance in actions for uncertain damages, but only in actions for debt; and second, because the application for the procedendo came too late,

not having been made till after the certiorari was returned and filed of record in this court. Upon the first point he referred to the statutes 12 G. 1. c. 29. 19 G. 3. c. 70. s. 6. upon which the 51 G. 3. c. 124. was founded, as shewing that the object of the legislature was to confine the provisions of the latter to actions in inferior courts, brought for the recovery of debts, or for such causes of action for which a defendant may be arrested, and not to extend them to actions brought for damages merely; and on the second point he cited *Tidd's* Practice (*a*), *Fazakerly* v. *Baldo* (*b*), and *Gilbert* on Executions (*c*).

Chitty, contrà, was stopt.

PER CURIAM. This rule must be made absolute. The statute is not confined to actions brought to recover liquidated damages; it extends to all actions brought for the recovery of debts or damages under 15*l*. It is peremptory in providing that no such cause shall be removed unless the defendant shall enter into a recognizance to the plaintiff in the inferior court, with two sufficient sureties in double the sum due for the payment of the debt and costs, in case judgment shall pass against him; and as the present defendant has not complied with that provision, the certiorari issued irregularly, and the procedendo ought to go. The defendant could have no cause for complaint, because he had in the first instance suffered judgment to pass by default, and therefore when he sued out the certiorari, he was especially bound to give the plaintiff the security required by the law.

Rule absolute.

(*a*) 413, 7th Ed. (*b*) 1 Salk. 352. 6 Mod. 177. S. C. (*c*) 144, 5.

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Friday, May 28.

Where justices omitted to set out on the record of a conviction on the Building Act, the evidence adduced on the hearing of the information, as nearly as possible in the words used by each of the witnesses, in pursuance of 3 *G*. 4. c. 23. a mandamus issued to compel them to do so.

In the matter of Rix and Another.

SCARLETT on a former day obtained a rule calling upon two Justices of the county of *Surrey* to shew cause why a mandamus should not issue to them, commanding them to insert in the record of a conviction under the Building Act, 14 *Geo*. 3. c. 78. the evidence given on the hearing of the information upon which the conviction was founded, as nearly as possible in the words used by each of the witnesses examined upon the said hearing, in pursuance of the 3 *Geo*. 4. c. 23. it being suggested that they had omitted many parts of the evidence material to the defendant's case.

Cowley (with whom was *Thesiger*) now shewed cause and contended that it never could have been the intention of the legislature in passing the statute 3 *Geo*. 4. c. 23. to impose upon Justices the necessity of setting out upon the record of conviction the evidence of all the witnesses, whether relevant or irrelevant to the matter at issue, which a defendant, or even an informer, might think proper to adduce on the hearing of an information. That act gave a form of conviction to be adopted in all cases where no particular form was given by the statute; but although it directed that the evidence, as nearly as possible, in the words used by the witnesses, should be stated on the record; yet there was considerable doubt whether that direction extended to the evidence given on the behalf of the defendant. The words within the brackets were "[" *here state the evidence, and as nearly as possible, in the words used by the witness; and if more than one witness be examined, state the evidence given by each,*] [*or, if the defendant confess, instead of stating the evidence, say*] and the said *E. F.* acknowledged and voluntarily confessed the same to be true, &c." Now here there was no express direction that the evidence for the

defendant should be set out in case he did not confess. All that the direction imported was, that where the defendant did not confess, then the evidence in support of the information should be set out; but where he confessed, then it need not be set out, and the Justice is simply to state the nature of the charge contained in the information, and then proceed to state that the party acknowledged and voluntarily confessed the same to be true. If the present application could succeed, it would entirely defeat the object of the statute, which was to facilitate summary proceedings before Justices, and to remedy the inconveniences often arising from the want of a general form of conviction. If the Justices were required to set out all the evidence in this case, they must load the record with a great deal of irrelevant and impertinent matter, and this would impose upon them a degree of difficulty which never could have been in the contemplation of the legislature, and which is certainly not authorised by the terms of the statute.

Scarlett, *Barnewall*, and *Chitty*, contrà, insisted that the direction of the statute was clearly intended to embrace the evidence both pro and con. The object of the legislature was to require the Justices to shew upon the face of the record that the conclusion of guilt, which they had drawn by the conviction, was warranted by the evidence. This object could not be effected by partially setting out the evidence on both sides on the hearing of the information. There was no desire in the present case to load the record with irrelevant matter; all that was required was, that the Justices should set out so much of the evidence on both sides as would raise an important question on the Building Act, which the parties interested wished to bring under the consideration of the Quarter-Sessions. To this extent the application was justified by the terms of the statute.

Abbott, C. J.—I am clearly of opinion that the direction in the statute embraces the evidence both in support of the

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information and for the defence. The Justices are not bound to set out all the irrelevant matter which may happen to be given in evidence before them. They are to state the evidence as nearly as possible in the words used by the witnesses; but this must be understood to mean such evidence as is relevant to the charge contained in the information. The Justices must use their discretion in this matter; but it is quite clear that it is their duty to attend to the general direction contained in the statute. Here the Justices have not done that which the act requires them to do; and the single question is, whether we are to order them to do that which the law requires them to do; and I am of opinion that this rule must be made absolute. There was a similar application to this, made last *Easter* Term, in the case of a game conviction (*a*); and we were of opinion on that occasion that it was the duty of the Magistrates to set out the evidence on both sides where it was relevant to the matter at issue.

The other Judges concurred.

Rule absolute (*b*).

(*a*) See *Rex* v. *Marsh*, ante, 260.

(*b*) It may be useful here to insert the form given by the statute 3 G. 4. c. 23. which is as follows:—

County [*or as the case may be*] of } Be it remembered, that on the day of in the year of our Lord at in the county of A. B. of in the county of Labourer, [*or as the case may be*] personally came before me [*or, before us, &c.*] C. D. one [*or more, as the case may be*] of His Majesty's Justices of the Peace for the said and informed me [*or us, &c.*] that E. F. of in the county of on the day of at in the said did [*here set forth the fact for which the information is laid*] contrary to the form of the statute in such case made and provided, whereupon the said E. F. after being duly summoned to answer the said charge, appeared before me [*or us, &c.*] on the day of at in the said and having heard the charge contained in the said information, declared he was not guilty of the said offence [*or, as the case may happen to be*] did not appear before me, [*or us, &c.*] pursuant to the said summons, [*or, did neglect and refuse to make any defence against the said charge*]; whereupon I [*or we, &c. or nevertheless I, or we, &c.*] the said Justice, *or* Justices, did proceed to examine into the truth of the charge contained in the said information, and on the day of aforesaid, at

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Friday, May 28.

A yearly hired servant in husbandry, had by agreement, a house and garden, a rood of potatoe ground, and the keep of a cow on his master's land. The keep of the cow was instead of so much wages. The cow, having failed in milk, the master in place thereof, kept two heifers for him on his land, through kindness, and not in consequence of any bargain. The potatoe land and the keep of the two heifers being, together, above the value of 10*l.*: Held, that this was renting a tenement so as to confer a settlement, after a sufficient residence.

BY an order of two Justices, *James Fletcher*, his wife, and their three children, were removed from the parish of *Benniworth* to the parish of *Calcethorpe*, both in the county of *Lincoln*. On appeal, the Sessions quashed the order subject to the opinion of this Court, on the following case:

In the year 1803, the pauper, *James Fletcher*, then a married man, was hired by yearly hiring, as a confined laborer in husbandry with Mr. *Day*, of *Calcethorpe* Farm. The pauper had, according to agreement, a house and garden, a rood of potatoe land, and the keep of a cow on his master's land. The cow was instead of so much money for wages. The pauper remained in Mr. *Day*'s service eleven years, during which time, viz. in the year 1813, the pauper's cow failed in milk, on which account, through the kindness of his master, and not in consequence of any bargain, the pauper had in the place of the former cow, two heifers kept for him by his master, on his master's land, about eleven months. The potatoe land, and keep of the two heifers, were, together, of the value of 10*l.* per annum and upwards, but the potatoe land and keep of one cow, were below that value. On leaving Mr. *Day*, the pauper

the parish of aforesaid, one credible witness, to wit, *A. W.* of in the county of upon his oath, deposeth and saith [*if E. F. be present, say,* in the presence of the said *E. F.*] that within months [*or, as the case may be*] next before the said information was made before me [*or* us, &c.] the said Justice by the said *A. B.* to wit, on the day of in the year the said *E. F.* at in the said county of [*here state the evidence, and as nearly as possible in the words used by the witness; and if more than one witness be examined, state the evidence given by each*] [*or, if the defendant confess, instead of stating the evidence, say*] and the said *E. F.* acknowledged and voluntarily confessed the same to be true; therefore, it manifestly appearing to me [*or* us, &c.] that he the said *E. F.* is guilty of the offence charged upon him in the said information, I [*or* we, &c.] do hereby convict him of the offence aforesaid, and do declare and adjudge that he the said *E. F.* hath forfeited the sum of of lawful money of *Great Britain*, for the offence aforesaid, to be distributed [*or* paid, *as the case may be*] according to the form of the statute in that case made and provided. Given under my hand [*or* our hands, &c.] and seal, the day of in the year of our Lord .

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went to live as a confined laborer with Mr. *Briggs*, at *Scamblesby*, with whom he remained for five years. For the last three years of the pauper's service with Mr. *Briggs*, the pauper was relieved in *Scamblesby*, by the parish of *Donington-on-Bain*. At the expiration of the pauper's service with Mr. *Briggs*, the parish of *Donington-on-Bain* took him and his family to their parish, and put them into a cottage in the parish of *Benniworth*, an adjoining parish, where they continued to relieve them until some time in the year 1822. The pauper then became chargeable to the parish of *Benniworth*, and two Justices, by an order, removed him and his family to *Calcethorpe*. The question for the opinion of the Court is, whether the pauper gained a settlement in the latter parish.

Scarlett and *Empson*, in support of the order of Sessions. The cases in which it has been held that the right of a servant to feed cattle upon his master's land constitutes a tenement, within the meaning of the statute 13 & 14 *Car.* 2. c. 12. are very anomalous and extraordinary. Attempts are now making to extend this modern head of settlement, but they will not be received with favor by the Court. There is one rule which has never yet been broken through with respect to cases of this kind, namely, that where the feeding of the cattle is received by the servant as a portion of his wages, it does not constitute a tenement. Now the feeding of the two heifers in this case, clearly formed a part of the pauper's wages, and consequently cannot be held a tenement such as will confer a settlement. [*Bayley*, J. The case finds that there was no obligation on the master to provide the heifers for the benefit of the servant; there was no bargain to provide them—they were provided from motives of kindness (*a*); then can they be considered in the nature of wages?] It is not perhaps material to dwell upon that point, because the more comprehensive and important question is, whether the right to the profit of the

(*a*) See *Rex* v. *Fillongley*, 1 T. R. 458.

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cattle, whether acquired by favor or in the shape of wages, constituted the pauper the occupier of a tenement within the meaning of the statute. It seems impossible, consistently with the case of *Rex* v. *Cheshunt* (a), to say that the pauper here was an occupier, or that he came to settle; for here, as in that case, the occupation was only as a servant, and the relation of landlord and tenant did not exist. So in the recent case of *Rex* v. *Bardwell* (b), which was almost the same in circumstances with the present, it was held that the pauper did not come to settle as a tenant, and therefore acquired no settlement; and for this reason, that he took the feeding of the sheep as a servant, and therefore could not be considered as renting a tenement within the meaning of the statute. The mere pernancy of the profit of land by the mouths of the cattle is not sufficient; it must be enjoyed by means of an express contract; there must be a stipulation that the cattle shall be fed with the growing produce of the land, and the contract must be entire and to the full value of 10*l.* per annum. Now most, if not all of these circumstances are wanting in this case. The only two cases which bear against this argument are *Rex* v. *Fillongley* (c) and *Rex* v. *Lakenheath* (d); but the present is distinguishable from them both; from the former, inasmuch as here the *whole* tenement was dependent on the will of the master, and might have been withdrawn at any moment; and from the latter, because here there is no contract at all under which the pauper held, the case expressly negativing the existence of any contract. In order to acquire a settlement by renting a tenement, the following requisites must be complied with: the pauper must come to settle as tenant of *all* the property; *Rex* v. *Bowness* (e) and *Rex* v. *Glastonbury* (f); he must stand in the relation of tenant of the premises during the *whole* time; *Rex* v. *South Lynn* (g); for if he is merely occupier of a tenement from which he is

(a) 1 B. & A. 473.
(b) Ante, vol. iii. 369.
(c) 1 T. R. 458.
(d) Ante, vol. ii. 816.
(e) 4 M. & S. 210.
(f) 1 B. & A. 481.
(g) 5 T. R. 661.

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removeable at the pleasure of his landlord, that will not confer a settlement; *Rex* v. *Londonthorpe* (*a*); the value of the land on which the cattle are fed must appear to be 10*l*. per annum, the profit of the cattle amounting to that sum not being sufficient, *Rex* v. *Minworth* (*b*); and the contract under which he holds must be express, or at least cannot be implied without some evidence to shew its existence; *Rex* v. *Croft* (*c*). Here the pauper did not come to settle as tenant, and therefore never stood in the relation of tenant; besides which, even if he had done so, he was removeable at any time at the will of his master; the value of the land is not proved to be 10*l*. per annum; and there is no evidence of the existence of any contract for taking the tenement, without which the holding is inefficacious, and which in this case cannot be implied. Upon all these grounds it is submitted that no settlement has been acquired, and consequently that the order of Sessions must be confirmed.

Copley, A. G., *Nolan*, and *Clinton*, contrà. The feed of a cow, coupled with sufficient occupation, and the necessary amount of value, will confer a settlement, whether it is taken by the pauper expressly as tenant, or as a servant in lieu of wages; for if a man pays rent in labor, it is the same as money. Here the pauper, besides having a house to live in, had a rood of potatoe land, and two heifers, which were kept for him on his master's land. The potatoe land and the feed of the two heifers amounted together to the annual value of 10*l*. and therefore he rented a tenement within the meaning of the statute, and has acquired a settlement. The amount of rent actually paid by the occupier is quite immaterial, if the land he holds is of sufficient value. [*Bayley*, J. Did this pauper come to settle upon a tenement of sufficient value? This case seems to me, in some of its circumstances, to be new, and distin-

(*a*) 6 T. R. 377.
(*b*) 2 East, 198.
(*c*) 3 B. & A. 171.

guishable from all that have been cited.] He was tenant of property amounting altogether to 10*l*. per annum, and that is enough. *Rex* v. *Cheshunt (a)* does not apply, because that was decided upon the ground that the pauper occupied the house, not as tenant, but as servant. Whether rent is or is not in fact paid, is perfectly immaterial, if the value of the tenement be sufficient. *South Sydenham* v. *Lamerton (b)*. *Rex* v. *Fillongley (c)* is decisive to shew that occupation under a demise to a tenant to hold as long as the landlord pleases, and to be taken again by him when he pleases, is a sufficient taking of a tenement, and completely answers the objection on that point. That case has been recently recognised and confirmed in *Rex* v. *Croft (d)* and *Rex* v. *Lakenheath (e)*, and all those decisions must be overruled before the Court can hold that the permissive occupation in this case has vitiated the settlement. An express contract is not necessary, it may be inferred from the conduct and situation of the parties, and from the circumstances of the case. An actual enjoyment of any interest in land of the annual value of 10*l*. during the space of 40 days, is all that the statute requires, and that is found in this case. *Rex* v. *Bardwell (f)* was decided upon the ground that there was no agreement that the sheep should be pasture fed, and therefore does not govern the present case. In *Rex* v. *Bowness (g)*, the question was, not whether there was any contract, but what was the nature of the contract between the parties, and that was decided upon the ground that the contract was one of sale, and therefore that there was no occupation within the meaning of the statute; and the decision in *Rex* v. *Glastonbury (h)* turned precisely upon the same point. It has been said, that the pauper's occupation of the tenement was merely incidental to his service, and therefore conferred no settlement; but the fact is not so; this case falls completely

(a) 1 B. & A. 473.
(b) 1 Sess. Ca. 122. 1 Str. 57. S. C.
(c) 1 T. R. 458.
(d) 3 B. & A. 171.
(e) Ante, vol. ii. 816.
(f) Ante, vol. iii. 369.
(g) 4 M. & S. 210.
(h) 1 B. & A. 481.

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within the description given by Lord *Ellenborough*, C. J. in *Rex* v. *Minster* (*b*), where he says, "Here it is stated that the pauper hired two cows, and that they were kept on the land of the master during the summer months; and it does not appear that this was connected with the service, or that it was necessary for the convenient performance of it that he should have the two cows." *Rex* v. *Kelstone* (*c*) and other cases might be cited to the same effect, and to prove that the occupation in this case was such as the law requires. Upon every principle, therefore, it seems clear that the pauper has acquired a settlement by renting a tenement in the parish of *Calcethorpe*.

The case was argued on a former day in this Term, when the Court took time to consider of its judgment, which was now delivered by

Abbott, C. J., who, after recapitulating the facts stated in the case, said, "The question before the Court in this case was, whether, under the circumstances thus stated, the pauper had gained a settlement in the parish in which he was hired, and wherein he had these two heifers, and the other advantages mentioned in the case. We are all strongly impressed with the inconvenience of conferring a settlement by a contract under circumstances like the present, and with that impression we thought it better to consider this subject before we delivered our judgment. We have done so; but we find the law so firmly established, that the perception of the profits of land by the mouths of cattle is a tenement within the meaning of 13 and 14 *Car.* 2. and that if such a tenement be of the value of 10*l.* it will confer a settlement on the occupier, whether the rent be paid in money or labor, that we do not think ourselves at liberty to infringe this doctrine; and consequently we are of opinion that a settlement was gained by this pauper in the parish of *Calcethorpe*; and therefore the rule must be made

(*b*) 3 M. & S. 276.
(*c*) See *Rex* v. *Cherry Willingham*, ante, vol. iii. 13.

absolute for quashing the order of Sessions. The inconvenience, however, of this decision will only be retrospective, inasmuch as the law, so far as it regards this head of settlement, has been altered by the 59 *Geo.* 3. c. 50.; so that no person need now abstain from such acts of kindness towards laborers in husbandry as are mentioned in this case, through the fear of bringing a burthen on his parish.

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Rule absolute.

DAVIES v. ROGERS.

Monday, May 31.

An order for the discharge of an insolvent debtor under the small debts act 48 *G.* 3. c. 122. is absolute in the first instance, after due notice of the application being given to the plaintiff or his attorney.

COMYN moved for an order to discharge the defendant, under the small debt act 48 *Geo.* 3. c. 123. s. 1. from an action brought by the plaintiff in the Court of Great Sessions in *Wales*, in the county of *Montgomery*. He produced an affidavit of the prisoner, that the debt for which he was in execution was under 20*l.*; and that he had been twelve calendar months in *Montgomeryshire* gaol, and had given the plaintiff due notice of the present motion.

D. F. Jones opposed the defendant's discharge, contending, on the authority of *Exparte Neilson*(*a*) and *Magnay* v. *Gilkes* (*b*), that the defendant was only entitled to an order nisi. He admitted that a contrary practice had obtained in this Court, because the objection had never been taken.

THE COURT, however, were of opinion that if the plaintiff, or his attorney, had received due notice of the defendant's intention to apply to the Court for his discharge, that was sufficient. There seemed no good reason why, after due notice of the intended application, an order nisi only ought to be granted.

(*a*) 7 Taunt. 37. (*b*) Idem. 467.

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Jones then objected that the defendant's affidavit had been made on unstampt paper, and consequently he was not in Court. The last stamp act, 55 *Geo.* 3. c. 184. contained an exception in favor of persons applying under the Lord's act, but there was no exception as to prisoners seeking their discharge under the Small Debts act.

Comyn admitted that this was so, and therefore took nothing by his motion.

Rule refused.

Monday, May 31.

ATTENBOROUGH v. HARDY.

Where a plaintiff, in an inferior jurisdiction, brought an action for 8*l.* 17*s.* 3*d.*, but laid his damages in the declaration at 20*l.*, and the defendant, after interlocutory judgment signed against him, removed the cause into this Court by habeas corpus cum causâ, without entering into the recognizances required by 19 *G.* 3. c. 70. s. 6. the court refused a procedendo.

ON shewing cause against a rule nisi for a procedendo in this cause, the facts were these: Plaintiff brought an action against defendant in the King's Court of Record at *Nottingham*, for the recovery of 8*l.* 17*s.* 3*d.*, amount of goods sold and delivered to him within the local jurisdiction, and laid his damages in the declaration at 20*l.* The defendant entered an appearance, but no plea being filed within the time required by the practice of the Court, interlocutory judgment was signed, and the usual notice given for executing an inquiry of damages on the 28th *April* last. In the mean time the defendant sued out a habeas corpus cum causâ, for the removal of the action into this Court, and it was removed accordingly, without the defendant entering into the recognizances required by the 19 *Geo.* 3. c. 70. s. 6; and the question was, whether, as the plaintiff had laid his damages in the declaration at 20*l.* though the debt, in fact, was only 8*l.* 17*s.* 3*d.* the defendant was entitled to remove the cause by habeas corpus without entering into a recognizance with two sureties, pursuant to that statute, as in cases where the cause of action does not amount to 15*l.*

Chitty shewed cause against the rule, and contended, that

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the amount of damages laid in the declaration was the criterion by which the plaintiff's cause of action was to be estimated, and consequently this was not a case requiring bail upon the habeas corpus.

F. Pollock, contrà, contended, upon the words of the statute, that the actual debt being only 8*l.* 17*s.* 3*d.* that must be considered as the cause of action, and therefore that bail ought to have been put in on the removal of the cause. But,

PER CURIAM (*a*).—We think the amount at which the plaintiff lays his damages, and not the actual debt, must be considered as the cause of action within the meaning of the statute, and therefore this is not a case requiring bail upon the habeas corpus.

Rule discharged without costs (*b*).

(*a*) *Holroyd*, J. was gone to Chambers.
(*b*) See *Lee* v. *Goodlad*, ante, 350.

HARRISON *v.* BAINBRIDGE.

Monday, May 31.

The costs of a bill in Chancery, dismissed in favor of the defendant, may be set off against the plaintiff's costs of a suit in this Court for the same cause of action, subject to the attorney's general lien.

PATTESON had obtained a rule to shew cause why the costs allowed to the defendant by the Court of Chancery upon the dismissal of a bill filed by the plaintiff against the defendant in that Court, should not be set off and allowed against the verdict obtained by the plaintiff in this cause, and in the mean time the proceedings stayed, upon an affidavit, stating, that in *Michaelmas* vacation, 1820, the plaintiff commenced a suit in the Court against the defendant by filing a bill of complaint, to which the defendant put in an answer; that in *Trinity* Term, 1823, the suit was dismissed, and the defendant's costs were taxed at 60*l.* 10*s.* 5*d.*, for which a writ of subpœna issued against the plaintiff; that search had been made after the plaintiff, in order to serve

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him with the subpœna and to demand the money, but that he could not be found, and that the money is still due to the defendant; that in *Hilary* Term, 1823, the plaintiff commenced the present action against the defendant, which was tried at the Sittings in *Hilary* vacation, 1824, when the plaintiff obtained a verdict for 150*l.*, and will be entitled to final judgment and execution this term; and that the suit in Chancery, and the present action, were commenced by the plaintiff for the same cause of action, and on the same account, and with the same object.

Wightman now shewed cause, and contended, that this was an application to which the Court could not listen. The costs of a suit in equity cannot be set off against a verdict in a cause in this Court. In *Doe* v. *Winch* (*a*), the Court refused to stay the proceedings in an action of ejectment until the taxed costs of a suit in equity, brought by the same party, for the recovery of the same premises, were paid; and the principle upon which the Court acted was explained by *Abbott*, C.J. in the distinction which he drew between costs at law and costs in equity; "The costs at law," said he, "are the legal consequences of the suit; the costs in equity are in the discretion of the Chancellor, and entirely depend upon circumstances." It has also been held, that an action at law is not maintainable upon a decree of a Court of Equity, for a specific sum of money, founded on equitable considerations only; *Carpenter* v. *Thornton* (*b*); therefore, if the award of costs by the Court of Chancery would not support an action, it clearly cannot be set off against the claim consequent upon an action.

BAYLEY, J.—The case of *Hall* v. *Ody* (*c*), is a direct authority in support of this application. That was a motion to set off the costs of an action of ejectment recovered by the defendant against the plaintiff in *K. B.*, against the

(*a*) 3 B. & A. 602.
(*b*) 3 B. & A. 52.
(*c*) 2 B. & P. 28.

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costs of an action of trespass in *C. B.* in which the plaintiff had recovered a verdict; and it was insisted, that in all the cases where a set off of that kind had been allowed, both actions had been in the same Court; but the Court overruled the objection, saying, that a set off had even been allowed between costs in the Court of Equity and costs in the Court of Law; and *Heath*, J. observed, that he remembered that in a case where an ejectment had been brought in *K. B.* and afterwards a formedon in *C. B.*, proceedings were stayed in the latter until the costs of the former were paid.

ABBOTT, C. J.—That is a decisive authority. Here the application is only to set off the costs of one suit against the other, the subject matter of dispute between the parties being the same; and I see no objection why the costs of the one should not be set off against the other. The rule must be made absolute, subject, however, to the attorney's general lien.

HOLROYD and LITTLEDALE, Js. concurred.

Rule absolute (*a*).

(*a*) Vide 2 H. Bl. 243. 6 T. R. 456. 1 Taunt. 426. 8 East, 362. 1 M. & S. 240. Id. 696. 4 Madd. 391. 5 J. B. Moore, 95. 3 B. & A. 52.

THWAITES and Another *v.* GALLINGTON.

Monday, May 31.

Giving notice of exception to bail, without actually entering the exception, is a nullity, and the irregularity is not waived by the defendant's acting upon the notice.

ON shewing cause against a rule Nisi for staying the proceedings on the bail bond in this case without costs, the facts were these:—On the 10th *May*, the defendant having been arrested, gave notice of bail to the plaintiffs' attorney, and on the 11th, the defendant's attorney was served with notice of exception, whereupon notice of justification was served for the 15th, on which day the bail were opposed, and one of them was rejected; and the time for justifying

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bail having expired, an assignment of the bail bond was taken: it was afterwards discovered that no exception had, in point of fact, been entered by the plaintiffs' attorney in the bail book kept at the Judge's chambers, pursuant to the rule M. 8 A. r. 2. and the defendant having perfected his bail, obtained the rule above mentioned, and the question now was, whether the omission actually to enter an exception to the defendant's bail, rendered the plaintiffs' proceedings irregular.

Campbell, for the plaintiff, contended, that the defendant had waived the objection by acting upon the notice of exception, which had been served, and that in point of practice the exception need not be actually entered.

Chitty, contrà, insisted, that it was necessary actually to enter the exception, otherwise the mere notice of an exception would be a nullity. In *Hodson* v. *Garrett* (a), *Abbott*, C. J. said, "there is no doubt that the exception ought to be entered, according to the practice of the Court, and I do not think the defendant waives his objection by having acted upon the notice merely, and therefore I think the proceedings irregular. There is something which the plaintiff ought to have done which he has not done."

The COURT, acting upon the authority of this case, made the rule absolute, upon payment of costs.

Rule absolute accordingly.

(a) 1 Chit. Rep. 174. See Tidd, 236. and 1 Archbold, p. 83.

BRAMWELL and Another, Assignees of NOAKES, a Bankrupt, *v.* LUCAS and Others.

Monday, May 31.

Where a trader, at the suggestion of his attorney, called a meeting of his creditors, to be held at a given time and place, and on the morning of that day went to the attorney's office, and inquired of him whether he could safely attend the meeting without being arrested for debt, and the attorney having advised him to remain at the office, until it was ascertained whether the creditors would engage to give him a safe conduct; the trader remained at the office accordingly, for upwards of two hours, to avoid being arrested by some or one of his creditors, until after the attorney had attended at and returned from the meeting: Held, that what passed between the attorney and the trader, was admissible in evidence upon an issue whether the latter had committed an act of bankruptcy on that occasion.

TROVER, by the assignees of *William Noakes*, a bankrupt, to recover the value of a lease and divers goods and chattels, amounting in value to 280*l.* 19*s.* 10*d.* converted by defendants to their own use. Plea not guilty, and issue thereon. At the trial before *Abbott*, C. J. at the *Middlesex* Sittings, after last *Hilary* Term, a verdict was found for the plaintiffs, subject to the opinion of the Court upon the following case:

On the 7th *November* last, at seven o'clock in the evening, the lease and goods in question were seized by the defendants, *Mathias Prime Lucas* and *William Thompson*, who were Sheriffs of *London*, and also Sheriff of *Middlesex*, under two writs of Elegit, issued on that day, founded on a judgment obtained by the defendant *Thomas Groves* against the said *William Noakes*, for 4,000*l.* damages, eighty-four shillings costs; and the only question in the cause was, whether the said *William Noakes* had committed an act of bankruptcy prior to such seizures under the said writs. In order to prove such prior act of bankruptcy, Mr. *Scott* was called as a witness, on the part of the plaintiffs, and stated that he acted as solicitor to the bankrupt, and in that character, and upon his, Mr. *Scott's*, suggestion to the bankrupt, called a meeting of his creditors, to be held at the *George and Vulture* Tavern, in *Cornhill*, at twelve o'clock at noon, on the said 7th *November* last; that in the morning of that day the said *William Noakes* came to the said Mr. *Scott's* office, in *St. Mildred's* Court, in the *Poultry*, and inquired of the witness whether he could safely attend such meeting of his creditors without being arrested for debt; that the said Mr. *Scott* advised him to remain at his office until it was ascertained whether the creditors would engage to give

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him a safe conduct; and that the said *William Noakes* accordingly did remain at the said Mr. *Scott's* house, or office, for upwards of two hours, to avoid being arrested by some or one of his creditors, until after the witness had attended at and returned from the said meeting of the said *William Noakes's* creditors. It was objected on the part of the defendants, that the evidence of Mr. *Scott* was not admissible under the circumstances, to prove what passed at his office as above mentioned, but the Lord Chief Justice received the evidence, subject to the opinion of the Court as to its admissibility. The question for the opinion of the Court is, whether the evidence of the witness *John Scott* was, under the circumstances, admissible. If the Court shall be of opinion that it was admissible, the verdict is to stand; if not, a nonsuit is to be entered.

F. Pollock, for the plaintiffs.—The evidence was properly received. The objection raised against its admissibility is, that the conversation which passed between the bankrupt and the witness, was a confidential and professional communication between a client and his attorney; but when the principle upon which such communications are protected is examined, it will be found not to extend to this case. In the first place, the transaction which was the subject of the conversation, was wholly alien from the character of an attorney; secondly, the inquiry made by the bankrupt, related to a matter of fact and not of law; and thirdly, it was made with a view to commit an act of bankruptcy. In all these respects this evidence is unprotected by the privilege claimed for it. The foundation of the privilege is the necessity of a free communication between a client and his attorney upon matters of law, but it does not extend to collateral circumstances, nor to mere matters of fact; it does not protect a communication which is not made by way of instruction for conducting the client's cause, *Cobden* v. *Kendrick* (a), and it is confined to cases where the attorney is acting in his

(a) 4 T. R. 31.

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character of attorney; *Wilson* v. *Rastall* (a). Now Mr. *Scott*'s interference in this instance was not essential to the bankrupt in the conduct of his affairs, nor was it offered by him in his character of attorney, and therefore this case is fully within the principles laid down in the two cases cited. But still less can the act of the bankrupt arising out of the conversation be protected; the privilege has never been held to extend beyond verbal communications. *Rex* v. *Watkinson* (b), where it was held that an attorney who was present at the putting in an answer to a bill in Chancery, by the defendant, who was indicted for perjury therein, could not be obliged to swear to that fact, has been overruled both in principle and authority by *Doe* v. *Andrews* (c), *Spenceley* q. t. v. *Schulenburgh* (d), and many other cases. In this case great injustice will be done if the evidence is excluded. The question in the cause is, whether the bankrupt has committed a legal act of bankruptcy; the intention with which he remained at Mr. *Scott*'s office, is a part of the act done; the animus, and the declaration expressive of it, are parts of the res gesta; and if they are shut out, the question whether he did or did not commit an act of bankruptcy, cannot be answered. Besides, in the purview of the bankrupt laws, an act of bankruptcy is a crime; a state of poverty by which the man is disabled from satisfying his creditors, may not be criminal, but the wilful avoidance of his creditors is criminal; and it cannot be allowed, that a man who casually becomes the spectator of the commission of a crime, is privileged to conceal it, merely because he is an attorney. [*Bayley*, J. When the conversation took place, it was not ascertained whether a crime had been committed or not.] The commission of the crime followed as a consequence of the conversation, and was in substance a part of it; therefore the whole was an act done, which Mr. *Scott* was bound, for the ends of justice, to reveal. *Lloyd* v. *Heathcote* (e).

(a) 4 T. R. 753.
(b) 2 Str. 1122.
(c) Cowp. 845.
(d) 7 East, 357.
(e) 5 J. B. Moore, 129.

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In a recent case at the Old Bailey (a), where the prisoner was indicted for forging a will, his attorney was allowed to prove that he had, by the prisoner's desire, carried the will from him to the Registry Office in Doctors' Commons. [*Bayley*, J. There may be a distinction as to the admission of evidence of this nature, in criminal and in civil cases; an act of bankruptcy can hardly be called a crime in the sense of the word, which would render it obligatory upon any person who knew of it, to disclose the fact for the purposes of public justice.]

J. Williams, for the defendants.—The real question is, whether this communication, being one not made in the progress of a cause, is, or is not, within the privilege. Most of the arguments brought forward on the other side, may be admitted without prejudicing that question. In all the cases cited for the plaintiffs, the communication was either respecting a matter of fact, or was not made to the attorney, in his character of attorney, and therefore they are all distinguishable from the present. Now, it seems to be immaterial to the operation of the privilege, whether the communication is made while a suit is actually pending or not. *Gainsford* v. *Grammar* (b) decided that though propositions made by an attorney on the part of his client, (whether before or after the commencement of a suit,) respecting a demand which another person had against him, may be used as evidence against the client; yet, that those propositions cannot be proved by the attorney, from a regard to the privilege of the client (c); and *Robson* v. *Kemp* (d) seems to establish the same principle. Here the case finds that Mr. *Scott* is an attorney, and that he acted as solicitor to the bankrupt; it is therefore hardly going too far to say, that he was consulted upon the occasion in question, as an attorney, and therefore that the communication was confidential, and is protected by the privilege.

(a) *Rex* v. *Walter*.
(b) 2 Camp. 9.
(c) Phil. Ev. 70. 3d ed.
(d) 5 Esp. 52.

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Pollock, in reply, relied upon the argument that the communication being in the nature, and indeed part of an act done, and being made to the witness without any relation to his character of attorney, was not within the privilege, and therefore must be admitted as legal evidence. He cited, in addition to the other cases, *Duffin* v. *Smith* (*a*), and *Studdy* v. *Sanders* (*b*).

The case was argued on a former day in this term, when the Court took time to consider of their judgment, which was now delivered by

ABBOTT, C. J.—The question in this case was, whether the testimony of a witness of the name of *John Scott*, was, under the circumstances, admissible in evidence against the defendants; or, whether, upon the principle of the privilege between attorney and client, it ought to have been excluded. It was an action of trover, brought by the plaintiffs, as assignees of one *William Noakes*, and Mr. *Scott*, his attorney, was called by the plaintiffs to prove the act of bankruptcy. He gave in evidence that, on his suggestion, a meeting of the bankrupt's creditors was called; that that meeting was appointed to be held on the 7th of November, at twelve at noon; that *Noakes* called on him that morning, and asked him if he could safely attend that meeting without being arrested; that he, *Scott*, advised him to remain at his office, until it was ascertained whether the creditors would give him a safe conduct; and that he, accordingly, did remain there two hours, to avoid being arrested, until *Scott* returned. The question is, whether the whole or any part of this evidence ought to have been excluded. That *Scott* was compellable, and was properly admitted to prove, that the meeting was called on his suggestion, and that *Noakes* came to and remained at his office, is beyond all doubt; but the point disputed was, whether *Noakes*'s question to *Scott*, and *Scott*'s answer, were not within the privilege. Whether the

(*a*) Peake's N. P. C. 108. (*b*) Ante, vol. ii. 347.

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privilege extends to all confidential communications between attorney and client or not, there is no doubt it is confined to those communications which are made to an attorney in his character of attorney. A question asked with the view to obtain legal advice, may come within the description of confidential communication, because it is part of an attorney's duty, as attorney, to give legal advice; but a question asked with the view to obtain information as to a matter of fact, being addressed to an attorney, where it might have been addressed to any other person, and being addressed to him where his character and office of attorney are not called into action, has never been held to be within the protection, and certainly is not within the principle upon which the privilege is founded. Then, was it a question for legal advice which was put to *Scott*, and was it put to him in his character of attorney; or, was it not a question for information as to a matter of fact, in which the professional character of *Scott* was not concerned? It can hardly be supposed that a man would ask, as a matter of fact, whether he would be free from arrest while attending a voluntary meeting of his creditors; but he might naturally ask, as a matter of fact, whether any arrangement had been made with his creditors as to his receiving a safe conduct at the meeting. Mr. *Scott*'s answer implies that the question was put with the latter view; he gives no legal advice; his answer implies that no arrangement had been made, but that he would see at the meeting if any could be made. He recommends Mr. *Noakes*, not as a legal adviser, but as any friend would have recommended him, to stay where he is till that matter of fact can be ascertained. Upon the ground, therefore, that no part of this evidence comes within the description of a confidential communication between attorney and client, we are of opinion that the whole of the evidence was properly receivable, and that the postea ought to be delivered to the plaintiffs.

Postea to the plaintiffs.

SWAYNE *v.* BLAND and SARGANT, Bail of ROBERTSON.

Monday, May 31.

Where an action was commenced in June, 1822, and after the defendant became bankrupt the plaintiff proceeded and signed interlocutory judgment, and issued a ca. sa. in Michaelmas, Term, 1823, to which non est inventus was returned, whereupon the plaintiff proceeded by sci. fa. against the bail, and signed judgment thereon on the 26th February, 1824: the Court refused to set aside the proceedings against the bail even upon payment of costs, though it was sworn that they knew nothing of the proceedings after declaration against the principal, or against themselves, until they received notice on the 27th February that they were fixed.

IN *June*, 1822, the plaintiff held *Robertson* to bail on a special original for 160*l.* returnable "on the morrow of *All Souls.*" On the 1st *November* following a commission issued against *Robertson*, under which he was afterwards declared a bankrupt. In *Michaelmas* Term following, the plaintiff declared in the action, whereupon the defendants, *Bland* and *Sargant*, became special bail therein. On the 29th *November* a plea of judgment recovered was filed by *Robertson*, in the action. On the 4th *March*, 1823, *Robertson* obtained his certificate, and on the 20th *April* plaintiff's attorney delivered the paper book, with a replication of nul tiel record, and on the 30th of the same month signed interlocutory judgment; on the 15th *May* he gave a notice of inquiry, and on the 24th of the same month executed a writ of inquiry, and on the 30th of the same month gave a rule for judgment, and on the 6th *November* following issued a *ca. sa.* against *Robertson*, which was returned non est inventus. On the 17th *January* last a sci. fa. was issued against the bail, to which was returned nihil, and on the 3d *February* an alias sci. fa. was issued, to which a like return was made, and on the 26th *February* plaintiff signed judgment against the bail. On a former day a rule nisi was obtained for setting aside the proceedings against the bail on payment of costs, on affidavits which stated the facts above mentioned, and adding that the bail were wholly ignorant of any further proceedings having been taken against the principal after they had become his bail, still less against themselves, until the 27th *February* last, wheh they were informed by the plaintiff's attorney that they were fixed on their recognizance as above mentioned.

Campbell now shewed cause, and contended, on the authority of *Clarke* v. *Hoppe* (*a*), that after the lapse of so long

(*a*) 3 Taunt. 46.

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a time, the bail were not entitled to any relief, even on payment of costs. There it was held that if an action be commenced and the defendant become bankrupt, and obtain his certificate, and afterwards permit judgment to be signed for want of a plea, after which the plaintiffs proceed against the bail, the court will not relieve the bail on motion.

F. Pollock, contrà, relied upon *Mannin* v. *Partridge* (a), and *Harmer* v. *Hagger* (b), as authorities for shewing that, under the circumstances of this case, the defendants were entitled to have the proceedings stayed on payment of costs; sed per

Abbott, C. J.—We think, upon the authority of *Clarke* v. *Hoppe*, this rule must be discharged. The bail having omitted to apply for a whole twelvemonth, are entitled to no indulgence. If we were to accede to this application, it would place the plaintiff in a very different situation as to dividends under the bankrupt's commission, from what he would have been had the bail come in earlier. It is the duty of the bail to apprize themselves of the proceedings against the principal, and their laches in that respect takes away from them the right to complain of what has been done against themselves.

Holroyd, J. (c) and Littledale, J. concurred.

Rule discharged.

(a) 14 East, 599. (b) 1 B. and A. 332.

(c) *Bayley*, J. was gone to chambers.

SIMONDS and LODER *v.* WHITE.

Monday, May 31.

An action will not lie in this country to recover back money paid upon an average loss adjusted at *St. Petersburgh* according to the law of *Russia*, [the consignor and the consignee of the goods, and the owner of the vessel being *British* subjects] although by the law of *England* an average loss would not be payable under the circumstances.

ASSUMPSIT, to recover £106. 3*s.* 6*d.*, money paid by plaintiffs to the use of defendant. At the trial before *Abbott*, C. J. at the Sittings in *London* after last *Hilary* Term, a verdict was found for the plaintiffs, subject to the opinion of the court upon the following case:—

The plaintiffs are *British* subjects, having a mercantile establishment in *London*, where *William May Simonds* resides; and at *St. Petersburgh*, where *Giles Loder* resides, under the permission of the *Russian* government. The defendant is also a *British* subject, and the owner of the *British* ship *Marnhall*, which was chartered at *Gibraltar* on the 15th *March*, 1820, by *William Cosens* and Co. who are *British* subjects residing at *Gibraltar*, for a voyage from *Gibraltar* to touch at the Isle of *Wight* for orders, and then to proceed immediately, if so directed, to *St. Petersburgh*. The vessel sailed on the voyage from *Gibraltar* on the 20th *March*, 1820, with a cargo on board, for which bills of lading were there signed in the following form, deliverable at *St. Petersburgh*:—

"Shipped in good order and well conditioned, by *William Cosens* and Co. in and upon the good ship called the *Marnhall*, whereof is master for this present voyage, *John White*, now riding at anchor in *Gibraltar* bay, and bound for *St. Petersburgh* (enumeration of the goods, and their marks, weights, &c. here follow), being marked and numbered as in the margin, which are to be delivered in like good order and well conditioned, at the aforesaid port of *St. Petersburgh*, (the dangers of the seas only excepted) unto or assigns (afterwards filled up to Messrs. *W. M. Simonds* and Co. the plaintiffs, or their assigns) he; or they, paying freight for the said goods as per charter-party, with primage and average accustomed. In witness whereof the master or purser of the said ship hath signed four bills of lading, all

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of this tenor and date, by one of which four bills being accomplished, the other three to stand void. *Gibraltar*, 13th *March*, 1820. *John White*, wt. unknown."

On the arrival of the vessel at the Isle of *Wight*, the plaintiffs purchased the cargo from the agents in *London* of the said *William Cosens* and Co., and the ship afterwards proceeded on to *St. Petersburgh*. In the course of the voyage she struck on a reef of rocks off the Isle of *Lessoe*, when the long boat was got out, and the small bower cable and anchor were carried out to endeavour to get her off, but the tide being strong, it drifted the vessel on to the cable, which was thereby rendered useless and unfit for service. Assistance was procured, and the vessel got off. She put into *Elsineur*, where the master purchased a new cable, and the vessel finally completed the voyage, and delivered the cargo in safety, under the aforesaid bill of lading. When the vessel arrived at *St. Petersburgh*, a statement of general average on the voyage, according to the *Russian* laws upon that subject, was made up and settled by an officer appointed for that purpose by the *Russian* government, called the dispacheur. A copy of the dispacheur's statement is annexed, and may be referred to by either party as a part of the case. In that statement was included, as a charge upon the cargo for general average, the sum of 106*l.* 3*s.* 6*d.* for the cost of the new cable, beyond the old one, surveying the old cable, weighing and getting the new cable on board, the duty payable on the foreign cable when brought into *England*, and the new cable's proportion of the above charges, which are admitted to be general average according to the law of *Russia*; and the plaintiffs were called upon to contribute to the general average so calculated, and by the laws of *Russia* they were obliged to pay the sum demanded in order to get possession of the cargo. The cargo of the *Marnhall* was insured by a policy effected in *London*, the underwriters upon which refused to allow the cable and the charges connected with it as part of the loss. On the 21st *February*, 1821, the plaintiff, *W. M. Simonds*, wrote a letter to the

defendant demanding payment of the said sum of 106*l.* 3*s.* 6*d.* The question for the opinion of the Court is, whether the plaintiffs are entitled to recover back from the defendant the whole or any part of the said sum of 106*l.* 3*s.* 6*d.* If the Court shall be of opinion that the plaintiffs are entitled to recover back the whole or any part, the verdict is to stand for the whole or such part; otherwise a nonsuit is to be entered.

F. Pollock, for the plaintiffs. This case must be considered as if the defendant claimed to retain the money as due upon an average loss, arising upon a voyage undertaken under a charter-party made in *England*; and so considered, it is obvious that the defendant cannot support that claim upon any legal ground. The situation of the parties is not immaterial. The plaintiffs and the defendant are *British* subjects, and the latter is the owner of a *British* vessel, which therefore, for many purposes, carries with it, wherever it goes, a *British* domicile, and is subject to *British* laws and usages. *Power* v. *Whitmore* (*a*) seems to be in a great degree decisive of the present case. It was there held that "the insurer of goods to a foreign country is not liable to indemnify the assured (a subject of that country), who is obliged by the decree of a court there, to pay contribution to a general average, which by the law of this country could not have been demanded, where it does not appear that the parties contracted upon the footing of some usage among merchants, obtaining in the foreign country, to treat the same as general average, but such usage is to be collected merely from the recitals and assumption made in the decree." Undoubtedly that decision turned in some measure upon the absence of proof of the usage of the foreign state, in which respect it differs from this case; but still, taken altogether, it warrants the position that the insurer is not liable in such cases to indemnify the assured. [*Bayley*, J. That case

(*a*) 4 M. and S. 141.

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turned entirely upon non-proof of usage; there was nothing to shew that the decree of the court at *Lisbon* was conformable to the laws or usages of *Portugal:* the cases therefore are wholly distinct.] It is admitted, that by the law of *England* this would not be held a general average loss. [*Abbott*, C. J. Then the only question is, which is to prevail, the law of *England*, or the law of *Russia*; for it seems undisputed that by the former this is not, and that by the latter it is, a general average loss.] In that view it becomes material to inquire what is the meaning of the words "average accustomed," in the bill of lading. Lord *Ellenborough*, speaking on this subject in *Power* v. *Whitmore*, says, "this contract must be governed, in point of construction, by the law of *England*." Now, construing the present contract according to that rule, the words "average accustomed," being part of the printed form of the bill of lading, must be taken as words of general and universal meaning, and must be understood with reference to the laws of *England*, where the contract was made. The damage done to the vessel accrued long before she arrived within the limits of the state of *Russia*, on the high seas, while she was under the protection and within the rule of the laws prevailing in *England*. True; she was then proceeding in the performance of an intention to go to *St. Petersburgh;* but that cannot vary the case, nor let in the laws of *Russia* to prevail under such circumstances, and to settle the rights of *British* subjects under a contract made in *Great Britain* and in pursuance of *British* laws. The law, under the operation of which the vessel was, when the damage accrued, must be the law by which the claims of the parties are to be adjusted; mere matters of account may remain to be settled when the ship arrives at her port of destination, but the governing law and principle of the case was fixed by the local situation of the ship when the damage accrued. Suppose the case of a vessel chartered direct from *London* to *St. Petersburgh;* could it be contended that a loss which happened in the river *Thames* was to be settled according to the laws of *Russia*, merely because the port of

destination was situate within that kingdom? If not, where is the line to be drawn, except as has been already suggested? In *Power* v. *Whitmore*, it may also be observed, it was held that the court at *Lisbon* was not acting according to the law of nations, and therefore, that a decree of that court could not be binding upon the subjects of other states. [*Bayley*, J. Our ignorance of the terms of the charter-party places us in considerable difficulty here; the charter-party should have been set out in the case.] A view of the charter-party would not assist the court; it bears upon the question no further than by regulating the amount of the freight at so much per ton. [*Abbott*, C. J. At any rate the plaintiffs must have been liable to pay the freight.] The parties here are upon very unequal terms. This is a loss from which the plaintiffs cannot possibly protect themselves if they do not recover in this action; but the defendant may; he was the owner of the vessel, and he had only to effect an insurance upon her, and the underwriters must have secured him from loss. Again, the uncertainty of the ship's destination is a decisive objection against adjusting the average according to the *Russian* law; she was chartered for a voyage from *Gibraltar*, to touch at the isle of *Wight* for orders, and then to proceed immediately, *if so directed*, to *St. Petersburgh*. She might never have arrived there, and therefore the intention of the parties to send her there, can make no difference in the application of the principle now contended for. If the intention to send a vessel to a particular place is to determine by what law the average is to be settled, the greatest inconvenience in the administration of maritime law will ensue. Upon these grounds it is contended that the plaintiffs are entitled to recover.

Whately, contrà. This average must be calculated according to the law of *Russia*, and consequently this action cannot be maintained. *Power* v. *Whitmore* does not control the present case. That was an action on a policy of assurance made in *England* and enforced in *England*, and which

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was an express and positive contract. This is a very different case. The case finds, that by the law and usage of *Russia*, this is a general average, and it is the known usage of merchants, throughout the world, to calculate all averages at and according to the law of the port of discharge. In *Power* v. *Whitmore* the defendant had no notice or knowledge of the suit instituted at *Lisbon*; but here one of the plaintiffs was resident at *St. Petersburgh*, and was cognizant of all the proceedings there; and in that case the parties were different, and different rights and liabilities attached. The general maritime law and the usage of merchants with respect to maritime affairs, are recognized by and binding according to the law of *England*. For this the *Consolato del Mare*, by *Barrett*, Ed. 1808, lib. 2. s. 222. p. 151; *Wellwood's* Sea Laws, 4to. tit. Contribution, s. 38. p. 325; *Pothier*, part 2. s. 1. art. 4; *Molloy*, p. 276. s. 7; and *Lex Mercatoria*, p. 244, &c. are authorities. Then the rule laid down by the general maritime law and the usage of merchants is, that where a loss occurs in the course of a voyage to a foreign port, the average is to be calculated and the loss settled at the port of discharge. *Magen's* Essay on Insurance, p. 5. lib. 1. s. 9. where he says, "Damages which occur in foreign parts and are adjusted there, ought to be settled here according to such adjustments, though the regulations which were followed should be contrary to our laws." [*Bayley*, J. Then this difficulty seems to me to arise. If the laws of *Denmark* and those of *Russia* differ, there must be a different rule of adjustment, according as the vessel stopt and settled at *Petersburgh* or at *Elsineur*.] Not so; because the rule is, that the loss shall be settled at the port of discharge only; therefore where the loss happens is immaterial. It is said, that the underwriters in this case are not liable; but if they are not, that cannot affect the defendant's right. Whether the underwriters are, or are not, liable, is not the question. Then it is argued that the destination of the ship was uncertain. True there was a power to alter the destination from *St. Petersburgh* to some other port, but that was merely a

defeazance not in fact executed, and therefore has no influence upon the result of the case. Even the charter-party, therefore, does not leave the destination uncertain, though it would be immaterial if it did, because the present question arises not on the charter-party, but on the bill of lading, which expressly orders the cargo "to be delivered at *St. Petersburgh.*" The great inconvenience which would arise, if the law were as contended for on the part of the plaintiffs, must not be overlooked. Bills of lading are frequently assigned from hand to hand, and if the last assignee were not liable to contribute to an average loss, but the captain was compelled to revert to the original holder, he would be put to great difficulty in obtaining payment, and would often find himself without any remedy at all. Again, suppose an inhabitant of *St. Petersburgh* is the last assignee of the bill of lading; is he to come to *London* to ascertain the average; or how is he to know what he is to contribute, unless the average is adjusted at *St. Petersburgh?* The very principles of commerce would be subverted by the mode contended for on the other side. Secondly, as the average has been settled by a court of competent jurisdiction (for it is admitted by the case that it has been settled according to the law of *Russia*), and as the plaintiffs have once acknowledged the justice of that settlement by paying their contribution; this court, on the one hand, cannot interfere to set aside the settlement; nor can the plaintiffs, on the other, now contest its legality. Upon these principles the defendant is entitled to retain the money, and cannot be made liable in the present action. But, it is said, average accustomed means average according to the law of *England*. That proposition must be denied. "Accustomed" means such average as is usual among merchants throughout the world, and the contract being made between two *English* subjects, will not limit the meaning of the term from the universal usage of merchants in general, to any peculiar construction derivable from the law of *England*. There is, however, no such peculiar construction to be found, for the law of *England* concurs with

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the usage of merchants in saying, that the only proper place for settling the average is the port of destination. Any other construction would produce universal and endless confusion and dispute, and would destroy those very conveniences and interests of commerce, which it is the object of all commercial laws and usages to cherish and promote.

Pollock, in reply. Without infringing the claims which the foreign writers cited on the other side, possess to respect in this Court, it is sufficient to say, that their dicta do not apply to the present case, for not one of them points out the mode in which an average is to be calculated under the peculiar circumstances of this contract. The section in *Magen* does not include a loss under a contract like this, it only says, (quoting the evidence relating to insurances, made at *Florence* and at *Stockholm*,) "that all insurances in their respective dominions, whether made for their own subjects or foreigners, shall be conformable to the tenor of their ordinances, and that no regard shall be paid to what may be alleged of the customs of others." The primary rule therefore is, that all contracts of insurance, whether made by foreigners or natives, shall be governed by the laws of that country in which they are made. So that it should be shewn on the other side, either that these parties had expressly undertaken by the terms of the bill of lading to be bound by the laws of *Russia*; or else that there was a custom among merchants in *London* so to settle their averages. Here the contract is perfectly silent upon that subject, and there is no such custom shewn. The *English* law knows of no custom to settle averages by any foreign law: "average accustomed," therefore, can mean only that which is in use here. The domicile of the contracting parties is one, and a most just mode of deciding, where and how the average is to be adjusted, and that should govern here, for both the parties are resident in *England*. Suppose the vessel had been, in consequence of damage, compelled to stop and refit at *Elsineur*; what must have been done then?

Must the average have been taken according to the *Danish* law; or, must the parties have sent to *St. Petersburgh* to ascertain the *Russian* law? [*Bayley*, J. The whole question must depend, at last, upon the construction of the single word "accustomed."] Undoubtedly it must, and the proper construction is, that average which the laws and usages of *England* adopt. [*Bayley*, J. Then suppose the bill of lading is assigned to a *Russian*; must he be bound by the *English* usage?] Certainly he must, because the original contract being according to the *English* usage; he who adopts the contract, must adopt the usage applicable to it. [*Bayley*, J. Suppose a *Russian* vessel chartered to *England*, the consignee to pay "average accustomed;" would that be the *Russian* or the *English* average?] The *English*, certainly, because the Courts here would intend that the parties contracted according to the laws of *England*. [*Bayley*, J. Then this is precisely the converse of that case, and must we not therefore intend that by "average accustomed" in this contract, the parties meant the *Russian* average?] That by no means follows as a necessary consequence. [*Abbott*, C. J. Suppose the word "accustomed" were not inserted in the bill of lading; would "average" then mean general average? I should apprehend not, for it is said in *Park*'s Insurance, 113, "another species of average, in matters of commerce, is that which we are accustomed to meet with in bills of lading, 'paying so much freight for the said goods, with primage and *average* accustomed.' In this sense it signifies a small duty, which merchants, who send goods in the ships of other men, pay to the master, over and above the freight, for his care and attention to the goods so entrusted to him." And he cites *Jacob*'s Law Dictionary, title, *Average*, to the same point.] If average accustomed does not mean general average, cadit quæstio. In *Power* v. *Whitmore* it is quite clear that the ship was a *Portuguese* bottom, and that therefore is a direct authority for saying, that the character of the vessel cannot vary the rights of the underwriters, and that the question of general average cannot be altered by the operation of foreign laws. [*Abbott*, C. J. The distinction

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I have just suggested, is to be found also in 1 *Magens*, 72. 2 Id. 278. and in Mr. Serjt. *Marshall's* treatise on Insurance, vol. ii. lib. 1. cap. 12. s. 7. p. 536. That learned writer, after having mentioned general and particular averages, says, " Beside these there are other small charges, called *petty* or *accustomed* averages. Such as pilotage, towage, light money, beaconage, anchorage, bridge toll, quarantine, river charges, signals, instructions, castle money, pier money, digging the ship out of the ice, &c. When these petty charges are incurred in the usual course of the voyage, they are not considered as a loss within the meaning of the policy, but only *a necessary and ordinary expense.*" There is, therefore, an obvious distinction between general average and average accustomed. The one is payable by the general principle of maritime law, though the mode of contribution differs in different states, and falls generally upon the whole or gross amount of the ship, freight and cargo, and the other falls upon each particular freighter as an extra expense necessarily incurred in the navigation of the vessel.]

The case was argued on a former day, in this term, when the Court took time to consider of their judgment, which was now delivered by

Abbott, C. J.—The question in this case is, whether the plaintiffs, proprietors of certain goods which were carried on board the defendant's ship, from *Gibraltar* to *St. Petersburgh*, being compelled at *St. Petersburgh* to pay, and paying to the defendant in order to obtain possession of their goods, a sum of money as contribution to a general average, settled at *St. Petersburgh*, according to the law of *Russia*, can recover back so much of the money thus paid as could not be charged to them, if made on an adjustment of average according to the laws of *England*, the ship being a *British* ship, and all the parties *British* subjects. We are of opinion that the plaintiffs cannot recover back this money. On the part of the plaintiffs it was argued, that the case

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must be considered in the same way as if they were now suing for an average arising in a *British* port, and the authority cited was *Power* v. *Whitmore*. That case, however, cannot govern the present for two reasons; first, because it arose between different parties and on a different contract, namely, a policy of insurance; and secondly, because in the opinion of the Court the facts there stated did not shew that the average had been adjusted according to the established law and usage of the country where the adjustment took place, whereas in the case in which this question arises, it is admitted that the average was adjusted according to the law of the country in which it was paid. The principle of general average, namely, that all whose property is saved at the sacrifice of the property of another, shall contribute to make good his loss, is very ancient, and is in universal acceptance among commercial nations. The obligation to contribute depends, not so much on the force of any particular custom as upon the general rule of maritime law. That obligation may indeed be limited, regulated, or even excluded, by the special terms of the contract, or by the consent of the contracting parties: but there is nothing of that kind in any part of the contract between the parties in this case. There are, however, many variations in the laws and usages in different nations, as to the losses which are considered to fall within the principle of general contribution; but on one point they all agree, namely, that the place in which the average shall be adjusted shall be the place of the ship's destination, or where she carries her cargo for delivery. I believe, also, they all agree on another point, namely, that the master is not compellable to part with the possession of the goods until the sum contributable in respect of them, either shall have been paid, or the payment thereof secured to his satisfaction. This appears by the case now before us, to be the law of *Russia*. This principle is laid down even by the Civil Law, and is noticed in the *Digest, lib.* 14. *tit.* 2; it is expressly stated in the *Consolato del Mare*, cap. 98; and it is alluded to by *Valin*, in his commentary on the

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French Ordinance, Article 21; and is also recognised in several other foreign writers. If then the average is to be adjusted at the place of destination, by what law shall it be adjusted? One may suppose the case of a *British* ship carrying to a foreign port the goods of *British* subjects only, and delivering them to *British* subjects there: but such a case will rarely occur. Agreeing that sometimes it must, still the consignee of the goods will usually be a foreigner, and even if he be not a person of that description, the average must be taken on the usual terms; and where there are several shippers, even if all are *British* subjects, it will, in case of jettison, be for the interest of all those whose goods are sacrificed, that the master shall exercise his power of adjusting the average, in order that the expense and inconvenience of actions and suits of law may be avoided. But this cannot be done without causing the average to be adjusted at the place of destination. In the present case, the original loss might fall upon the ship. The master may exercise that power for his own safety, which in other cases he ought to exercise as a matter of duty for the safety of others. Now, if the goods belong entirely to persons of the nation where the ship has arrived, they cannot complain of an adjustment made under the authority of their own law. In such a case, it can hardly be contended as between them and the master, or as between some of them and the others of them, that the adjustment ought to be regulated by any other law than their own. Then suppose (which will be the most usual case) that the goods belong to persons of different nations, the adjustment must be made according either to some one law regulating the matter, or it must be made in parts, according to so many different laws as there happen to be persons of different nations concerned. The latter mode would be attended with great perplexity, irregularity and confusion, even if it could be found practicable, which in many cases it could not. In this case, therefore, the laws of the country must be adhered to, and this will not impugn any known doctrine or rule of *English* law. The shipper of goods tacitly, if not expressly, assents to general average

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as a known maritime usage, which may, according to the events of the voyage, be either beneficial or disadvantageous to him; and by assenting to that, he must be understood as assenting to the adjustment at the proper and usual place; it is, as it seems to us, an obvious consequence that he must be understood to assent to the adjustment according to the law and usage of the place at which the adjustment is made. We are of opinion that the adjustment is to be understood as depending on the general rules of the place, and not on the special and particular terms of the contract. It is of infinite importance to maritime commerce, that its regulations should be as select and as few in number as general justice will permit. The wisest and most equitable may, in a particular case, be productive of inconvenience, but such occasional and partial inconveniences are a much less evil than that confusion and uncertainty which never fail to accompany a multiplicity of local regulations. For these reasons we are of opinion that the plaintiffs are not entitled to recover, and therefore the Postea must be delivered to the defendant.

Postea to the defendant.

DOE, on the Demise of MARY GIBSON, JOHN GELL, JOHN WELBURNE and HANNAH his Wife, and JOHN IDLE and SUSANNAH his Wife, *v.* SARAH GELL.

Monday, May 31.

Devise "to my daughter M. G. all the houses, outhouses, garden and other property, which I hold under, &c. for 999 years. And I also give one half part of my books to my daughter M. aforesaid, the other half to my widow S. G., to be equally divided by T. S. If my daughter M. should happen to die unmarried, it is my will then that *her part aforesaid* shall be equally divided amongst all my brothers and sisters, share and share alike *by lot*. All the rest and remainder of my property, I give and bequeath to S. G. my widow." Testator's daughter died unmarried, under age and intestate. The leasehold property consisted of four tenements, with the appurtenances, and one garden. Testator had one brother and three sisters. Query, whether the gift over of the daughter's "part aforesaid," comprehended the whole of the property given to the daughter, or only the books? Held, that it included both.

EJECTMENT for a piece of land at *Almondbury*, in the county of *York*. At the trial, before *Bayley*, J. at the last *Yorkshire* Assizes, the case was this:—The lessors of the

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plaintiff, *Mary Gibson, John Gell, Hannah Welburne*, and *Susannah Idle*, are brother and sisters of *Thomas Gell*, deceased, and the defendant is widow, and an executrix, of the said *Thomas Gell*, who made his will, duly executed for the passing of real estates, bearing date 4th *January*, 1821, as follows:—" I *Thomas Gell*, of the township of *Horsley*, in the parish of *Almondbury*, in the county of *York*, shopkeeper and schoolmaster, being sane in mind but weak in body, do make and ordain this my last will and testament as follows: In the first place, I give and bequeath to my daughter, *Mary Gell*, all the houses, outhouses, garden, and other property, which I hold under the trustees of the poor of the township of *Almondbury*, for the term of nine hundred and ninety-nine years. And I also give one half part of my books to my daughter *Mary Gell* aforesaid; the other half to my widow *Sarah Gell*, to be equally divided by *Thomas Sanderson*. If my daughter *Mary* should happen to die unmarried, it is my will then, that her part aforesaid shall be equally divided amongst all my brothers and sisters, share and share alike by lot. All the rest and remainder of my property, I give and bequeath to *Sarah Gell*, my widow. Also I do make and ordain *Sarah Gell*, my widow, and *Thomas Sanderson*, my executrix and executor of this my last will and testament, in writing, &c." The testator died, without revoking or altering this will, and possessed of all the property mentioned therein, on the 18th *August*, 1822, leaving the lessors of the plaintiff, the defendant, and his daughter *Mary*, him surviving. His daughter died in the month of *November*, 1822, unmarried, under age and intestate. The defendant has continued in possession of the whole of the leasehold property mentioned in the will, ever since the testator's death. The property in question consisted of four tenements, and outhouses, and one garden to the whole. The question at the trial was, whether the bequest to the lessors of the plaintiff, applied to the books only, or to the leasehold property also, and the learned Judge being of opinion that it applied to both, directed the

jury to find a verdict for the plaintiffs, with liberty to the defendant to move to enter a nonsuit, and

F. Pollock now moved accordingly. This case depends entirely upon the construction which the Court may think right to put upon the will of *Thomas Gell,* and two questions arise upon it: first, whether the bequest of "one half part, &c." to the daughter, who died unmarried and under age, past by her death to the defendant, the widow, under the residuary clause, or to the brother and sisters of the testator; and secondly, whether the words "half part" in the bequest to the latter, applies to the personal property, the books only, or to the leasehold property also. The language of the will is certainly ambiguous, and admits of much doubt as to its true construction and the real intent of the testator. It would rather seem, however, that the bequest, upon which this action turns, is confined to the personal effects, because a mode of division is pointed out and directed as to them, namely, by lot; but no such direction is given as to the houses, &c., for a division by lot, though natural and proper enough with respect to a quantity of books, would be most absurd and impracticable if applied to houses and a garden. "Her aforesaid part," referring to the daughter, must mean her share of the books; and therefore that only has passed to the lessors of the plaintiff by her death, and the leasehold estate has vested in the widow by the residuary clause. This seems the only reasonable construction of the will.

Abbott, C. J.—I am of opinion that the testator, in using the words "her part aforesaid," meant to say, "that part of my property, which I have before given to my daughter," and not to confine the expression to the share of the books, but to embrace the whole of what he had given her by the previous bequest. I think this construction is supported by considering the nature of the property in question. It is given over in the event of the daughter dying unmar-

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ried; and it is much more usual to give over property of this description, which is in its nature freehold and permanent, upon such an event, than to give it to the widow. The likelihood and probability of such an intention is fairly justified by the language of the will.

HOLROYD, J.—I am of the same opinion. I think the words "part aforesaid," mean the whole of that part of the testator's property which he had given to his daughter, and that he did not mean to give over to his brothers and sisters the daughter's share of the books only. It is more likely that he should give over the perpetual part of the property to his brothers and sisters, upon the event of his daughter's dying unmarried, than to his widow. No sensible reason can be suggested why he should give over only the daughter's share of the books, and not the other, which is the more important and permanent portion of the property. Giving the most sensible and natural construction to the words, I think "her part aforesaid" must be understood to mean the whole of that portion of the property which had been given to the daughter.

LITTLEDALE, J., having been of counsel in the cause, declined giving any opinion.

BAYLEY, J.—I also agree in thinking that the words "part aforesaid" apply to all the property which the testator had previously given to his daughter; and in consequence of her having died unmarried the whole will go to the lessors of the plaintiff. It appears to me, that there are words in the will which sufficiently indicate that such was the intention of the testator by the use of the word "part." By his will he gives his daughter certain houses, &c. specifically, and then he divides his books between his daughter and his wife; and all the rest and residue of his property, he gives to his widow. But before he comes to the residuary clause, he says, "If my daughter dies unmarried, *her*

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part aforesaid shall be equally divided amongst my brothers and sisters." Now the words "her part" mean the whole of her share of the property, unless there is something to limit their operation to her part of the books only. The books are to be divided between the daughter and the widow, by a particular individual named. But the share of the property, which is to go to the brothers and sisters in the event of the daughter's dying unmarried, is to be divided amongst them by lot. Mr. *Pollock* argues, that the division by lot is much more applicable to the books than to the leasehold property. In this particular case, I think the division by lot is much more applicable to the latter description of property, and is certainly a very reasonable mode of division, considering the description of property to be divided. The testator had certain land, on which he had built four tenements of the same description, with one garden belonging to the whole. He has four brothers and sisters, and the tenements being liable to be allotted to different proprietors, he says to them, "you shall chuse by lot which shall take the garden, along with one of the houses." I think the choice by lot confirms the construction which we are putting upon this will, and is more applicable to the division of the leasehold property than to the books.

Rule refused.

A. Duncan, one, &c. v. Carlton.

Monday, May 31.

Upon essoign declarations, the plaintiff cannot sign judgment for want of a plea, until the *afternoon* of the 5th day after the rule to plead is served.

PBELL, on a former day, obtained a rule nisi for setting aside the interlocutory judgment signed by the plaintiff in this case, as for want of a plea, with costs, for irregularity. On the first day of this term (5th *May*) the plaintiff served the defendant with a rule to plead within four days to a declaration delivered before the essoign day of the term. At the opening of the office on the morning of the 11th *May*, the plaintiff signed judgment as for want of a plea, no plea having been then pleaded. It was contended that judgment was signed too soon, because in the case of an essoign decla-

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ration the defendant has four days, exclusive of the first day of the term, to plead, and that the plaintiff in this case could not sign judgment until the opening of the office in the afternoon of the sixth day of the term.

Patteson shewed cause, and contended that there was no sensible reason why the defendant should have until the afternoon of the sixth day of the term to plead in the case of essoign declarations, any more than in the case of a declaration served in term. Here the defendant had four days exclusive to plead, and therefore there was nothing irregular in the plaintiff's signing judgment on the morning of the 11th *May*. He cited *Tidd*, 400. 7th ed. and *Messure* v. *Britten* (a).

Campbell, contrà, referred to the clerk of the rules to certify the practice (b).

ABBOTT, C. J. (after conferring with the clerk of the rules) said—The officers of the court report to us that the plaintiff signed his judgment too soon. It certainly is convenient that there should be the same rule of practice in the case of a declaration delivered before the essoign day of the term, as in the case of declarations delivered in the progress of the term, otherwise parties may be misled by a distinction for which certainly no satisfactory reason can be assigned. However, acting upon the practice as certified to us by the officers of the court, we must make the rule absolute for setting aside the judgment in this case.

HOLROYD, J. (c)—When a rule to plead is given, the day on which it is given, is always exclusive, and therefore in the case of a four day rule, the defendant has the fifth day

(a) 2 H. Bl. 616.

(b) Mr. *Wood* referred to a manuscript note of a case in point, as follows:—*Mic.* 48 G. 3. *Lingard* v. *Peto*. Mr. *Manley* moved to set aside a judgment signed too soon. The Master (*Forster*) told the court, that the extension of time to sign judgment until the afternoon, was only on rules to plead given on the first day of the term. Rule granted. See *Tidd*, 7th ed. 476.

(c) BAYLEY, J. was gone to chambers.

after the rule is given to plead. In the case of essoign declarations the practice has been that the judgment cannot be signed until the opening of the office in the afternoon of the fifth day after the rule to plead is served, but in other cases in the morning.

Littledale, J., concurred.

Rule absolute.

In the matter of

Monday, May 31.

A defendant admitted to bail upon an attachment, though a defective notice of bail had been served on the prosecutor.

COTTINGHAM moved that a defendant be committed to the custody of the Marshal upon an attachment for an alleged contempt, in order that he might be examined on interrogatories. The prosecutor had been served with notice of bail, but the notice being defective in point of form, he contended that it must be treated as a nullity, and therefore the defendant must go into custody.

The COURT, however, said, that as the objection was very strict, and obviously taken for the purpose of keeping the man in prison, they would, of their own authority, admit him to bail, as his sureties were in court.

The defendant was admitted to bail accordingly, and sworn to answer to interrogatories.

Parke was for the defendant.

DOE *v.* HEDGES.

Monday, May 31.

Judgment in ejectment set aside because signed too soon.

UPON a rule to shew cause why the judgment in this ejectment should not be set aside for irregularity, it appeared that the defendant's plea ought to have been filed on the 16th inst.; search was made at the office on the 17th, when it was not filed, and on the 19th judgment was signed as for want of a plea.

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The COURT held that the judgment was irregularly signed, and therefore made the

Rule absolute.

C. Cresswell for the plaintiff; *Chitty* for the defendant (*a*).

(*a*) Vide *Hyde* v. *Thrustout*, Sayer, 303.

DOE, on the several demises of PHILIP THOMAS, Esq. and FRANCES MARY, his Wife, and of SAMUEL MARTIN, v. WILLIAM ACKLAM.

Monday May 31.

A person born in the United States of *America* since the treaty of 1783, by which those states were acknowledged by this country to be free, sovereign and independent, is an alien, and cannot take lands by descent in *England*.

EJECTMENT to recover the possession of certain messuages, with the appurtenances, situate in the parish of *Saint Mary*, in the town and county of *Kingston upon Hull*.—Plea, not guilty. At the trial before *Abbott*, C. J. at the *Summer* Assizes, 1822, for the county of *York*, a verdict was found for the plaintiff on the second count of the declaration, upon a demise laid in the names of *Philip Thomas*, Esq. and *Frances Mary*, his wife, subject to the opinion of the Court upon the facts of the case, which were afterwards turned into a special verdict. The facts stated in the special verdict were these:—

Elizabeth Harrison, in the year 1813, became seised in fee simple, in possession, of part of the premises, and between that year and the year 1818, of the residue of the premises sought to be recovered by this ejectment, and died so seised at *Kingston upon Hull*, on the 26th *November*, 1818, intestate, and having never been married, leaving the said *Frances Mary*, the wife of the said *Philip Thomas*, her heir-at-law, if the said *Frances Mary* is entitled to take as heir under the circumstances hereinafter mentioned. *Peter Harrison*, the uncle of the intestate, and the grandfather of the said *Frances Mary*, being a natural born subject of this kingdom, left *England* for *America*, and resided there for

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many years, and until the time of his death, in the town of *Newhaven*, which is in the state of *Connecticut* in *North America*, which was at that time one of the *British* colonies of *North America*, where he held for many years, and until the time of his death, the office of Collector of his Majesty's Customs. The said *Peter Harrison* died at *Newhaven* aforesaid in 1775, and at his death left several children, him surviving; all of whom, except one daughter named *Elizabeth*, died during the life-time of the said intestate, without leaving any issue. The said *Elizabeth Harrison*, the daughter of the said *Peter*, was married on the 22d *October*, 1781, at *Newport*, in the state of *Rhode Island* in *North America* (which state of *Rhode Island* was at that time one of the *British* colonies), to *James Ludlow*, Esq. a native of *New York*, which was at that time one of the *British* colonies, and who was born before the year 1776, and originally brought up to the bar. The said *Elizabeth Ludlow* died in the *United States* of *America* in the year 1790, having had as the only issue of the said marriage two daughters, one of whom died extremely young, and the other of whom, the said *Frances Mary*, survived her said mother. The said *Frances Mary* was born at *Newport* in *America*, in the state of *Rhode Island*, on the 4th of *February*, 1784, after the *United States* of *America* were recognized as free, sovereign and independent states, as hereinafter mentioned, and was married at *New York*, in the state of *New York*, one of the *United States* of *America*, in the year 1807. The said colonies of *Connecticut*, *Rhode Island*, and *New York*, with other colonies in *North America*, separated themselves from the government and crown of *Great Britain*, and united themselves together, and on the 4th *July*, 1776, declared themselves free and independent states, by the name and style of *The United States of America*. On the 3d *September*, 1783, his late Majesty King *George* 3d, acknowledged the said *United States* of *America* to be free, sovereign and independent states, and a definitive treaty of peace was signed on that

day between his said Majesty and the said *United States*. The said treaty was then set out at length in, and made part of, the special verdict (a). After reciting a provisional article, signed at *Paris* on the 30th *November*, 1782, it contained the following articles:

Article 1. His *Britannic* Majesty acknowledges the said *United States*, viz. *New Hampshire*, *Massachusett's Bay*, *Rhode Island*, and *Providence Plantations*, *Connecticut*, *New York*, *New Jersey*, *Pennsylvania*, *Delaware*, *Maryland*, *Virginia*, *North Carolina*, *South Carolina*, and *Georgia*, to be free, sovereign and independent states; that he treats with them as such; and, for himself, his heirs and successors, relinquishes all claims to the government, propriety and territorial rights of the same, and every part thereof.

Article 2. And that all disputes which might arise in future on the subject of the boundaries of the said *United States*, may be prevented, it is hereby agreed and declared, that the following are and shall be their boundaries; viz. from the north-west angle of *Nova Scotia*, namely, that angle which is formed by a line drawn due north from the source of *St. Croix* river to the highlands, along the said highlands, which divide those rivers that empty themselves into the river *St. Lawrence*, from those which fall into the *Atlantic* ocean, to the north-westernmost head of *Connecticut* river, thence down along the middle of that river to the 45th degree of north latitude; from thence, by a line due west, on said latitude, until it strikes the river *Iroquois* or *Cataraquy*, thence along the middle of said river into the Lake *Ontario*, through the middle of said lake until it strikes the communication by water between that lake and Lake *Erie*, thence along the middle of said communication into Lake *Erie*, through the middle of said lake, until it arrives at the water communication between that lake and Lake *Huron*, thence along the middle of said water communication into the Lake *Huron*, thence through the middle of said lake to the water communication between that lake and

(a) Vide the Annual Register for 1795.

Lake *Superior*, thence through Lake *Superior*, northward of the isles *Royal* and *Philapeaux*, to the *Long Lake*, thence through the middle of said *Long Lake*, and the water communication between it and the Lake of the *Woods*, to the said Lake of the *Woods*, thence through the said lake to the most north-western point thereof; and from thence, on a due west course, to the river *Mississippi*, thence, by a line to be drawn along the middle of the said river *Mississippi*, until it shall intersect the northernmost part of the 31st degree of north latitude; south, by a line to be drawn due east from the determination of the line last mentoned in the latitude of 31 degrees north of the equator to the middle of the river *Apalachicola* or *Catahouche*, thence along the middle thereof to its junction with the *Flint* river, thence straight to the head of *St. Mary's* river, and thence down along the middle of *St. Mary's* river to the *Atlantic* ocean; east, by a line to be drawn along the middle of the river *St. Croix*, from its mouth in the Bay of *Fundy*, to its source, and from its source directly north to the aforesaid highlands, which divide the rivers that fall into the *Atlantic* ocean from those which fall into the river *St. Lawrence*, comprehending all islands within twenty leagues of any parts of the shores of the *United States*, and lying between lines to be drawn due east from the points where the aforesaid boundaries, between *Nova Scotia* on the one part and *East Florida* on the other, shall respectively touch the Bay of *Fundy* and the *Atlantic* ocean, excepting such islands as are now, or heretofore have been, within the limits of the said province of *Nova Scotia*.

Article 3. It is agreed, that the people of the *United States* shall continue to enjoy unmolested, the right to take fish of every kind on the grand bank, and on all other banks of *Newfoundland*, also in the Gulf of *St. Lawrence*, and at all other places in the sea where the inhabitants of both countries used at any time heretofore to fish; and also that the inhabitants of the *United States* shall have liberty to take fish of every kind on such part of the coast of *Newfoundland* as *British* seamen shall use (but not dry or cure the

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same on that island), and also on the coasts, bays, and creeks of all other of his *Britannic* Majesty's dominions in *America*; and that the *American* fishermen shall have liberty to dry and cure fish in any of the unsettled bays, harbours, and creeks of *Nova Scotia*, *Magdalen* Islands, and *Labrador*, so long as the same shall remain unsettled, but so soon as the same, or either of them, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such settlement, without a previous agreement for that purpose, with the inhabitants, proprietors, or possessors of the ground.

Article 4. It is agreed, that the creditors, on either side, shall meet with no unlawful impediments to the recovery of the full value, or sterling money, of all bonâ fide debts heretofore contracted.

Article 5. It is agreed, that Congress shall earnestly recommend it to the legislatures of the respective states, to provide for the restitution of all estates, rights, and properties, which have been confiscated, belonging to real *British* subjects; and also of the estates, rights, and properties of persons resident in districts in the possession of his Majesty's arms, and who have not borne arms against the said *United States;* and that persons of any other description shall have free liberty to go to any part or parts of any of the thirteen united states, and therein to remain twelve months unmolested in their endeavours to obtain restitution of such of their estates, rights, and properties as may have been confiscated. And that Congress shall also earnestly recommend to the several states a reconsideration and revision of all acts or laws regarding the premises, so as to render the said laws or acts perfectly consistent, not only with justice and equity, but with that spirit of conciliation, which, on the return of the blessings of peace, should universally prevail. And that Congress shall also earnestly recommend to the several states, that the estates, rights, and properties of such last-mentioned persons shall be restored to them, they refunding to any persons who may

be now in possession, the bonâ fide price (where any has been given) which such persons may have paid on purchasing any of the said lands, rights or properties, since the confiscation. And it is agreed, that all persons who have any interest in confiscated lands, either by debts, marriage settlements, or otherwise, shall meet with no lawful impediment in the prosecution of their just rights.

Article 6. That there shall be no future confiscations made, nor any prosecutions commenced against any person or persons, for or by reason of the part which he or they may have taken in the present war; and that no person shall on that account suffer any future loss or damage either in his person, liberty, or property, and that those who may be in confinement on such charges, at the time of the ratification of the treaty in *America*, shall be immediately set at liberty, and the prosecutions so commenced be discontinued.

Article 7. There shall be a firm and perpetual peace between His *Britannic* Majesty and the said States, and between the subjects of the one and the citizens of the other; wherefore all hostilities, both by sea and land, shall from henceforth cease. All prisoners on both sides shall be set at liberty, and His *Britannic* Majesty shall, with all convenient speed, and without causing any destruction, or carrying away any negroes or other property of the *American* inhabitants, withdraw all his armies, garrisons, and fleets, from the said *United States*, and from every port, place and harbour within the same, leaving in all fortifications the *American* artillery that may be therein; and shall also order, and cause all archives, records, deeds and papers, belonging to any of the said States or their citizens, which in the course of the war may have fallen into the hands of his officers, to be forthwith restored, and delivered to the proper States and persons to whom they belong.

Article 8. The navigation of the river *Mississippi*, from its source to the ocean, shall for ever remain free and open to the subjects of *Great Britain*, and the citizens of the *United States*.

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Article 9. In case it should so happen that any place or territory belonging to *Great Britain*, or to the *United States*, should have been conquered by the arms of either from the other, before the arrival of the said provisional articles in *America*, it is agreed that the same shall be restored without difficulty, and without requiring any compensation.

Article 10. The solemn ratifications of the present treaty, expedited in good and due form, shall be exchanged between the contracting parties in the space of six months, or sooner if possible, to be computed from the day of the signature of the present treaty. In witness, &c. Done at *Paris*, 3d *September*, 1783. *D. Hartley, John Adams, B. Franklin, John Jay*.

The special verdict then stated, that *Philip Thomas*, and *Mary* his wife, on the 1st *November*, 1821, demised to *John Doe*, the tenements with the appurtenances in the declaration secondly mentioned. It then concluded in the usual form; but whether upon the whole matters found, the defendant is guilty of the trespass and ejectment, the jurors are ignorant, and therefore pray the advice of the Court.

Tindal, for the lessors of the plaintiff. The question in this case is, whether a person born in the *United States* of *America*, since the treaty by which the independence of that country was recognised by the government of this, of parents who were natural born subjects of *Great Britain*, living in *America* at that time, and continuing to live there after the States were governed by their own authority, can inherit land in *England*. The affirmative of that proposition lies upon the plaintiff to establish, and it is contended that Mrs. *Thomas*, one of the lessors of the plaintiff, is entitled to recover, because she is the daughter of persons who were at the time of her birth natural born subjects of *Great Britain*. The material facts found by the special verdict are, that *Frances Mary Ludlow*, the wife of the lessor of the plaintiff, in right of whom this action is brought, was born at *Newport*, in *Rhode Island*, on the 4th *February*,

1784; that her mother, *Elizabeth Harrison*, and her father, *James Ludlow*, were both natural born subjects of *Great Britain*, having been born in one of the *British American* colonies, before the separation, in 1776. This is the first time since the independence of the *United States* has been acknowledged, that the question has come directly before a court of justice in *England*, as to the right of an *American* to succeed to landed property in this country. It is therefore a question of considerable importance, and at first sight would seem to present insuperable difficulties in the way of the plaintiff. There is, however, less of doubt upon the question than might strike the minds of many. In order to sustain the plaintiff's right to recover, it is necessary to establish three propositions, first, that all persons born within the colonies of *North America*, whilst they were subject to the Crown of *Great Britain*, were just as much *British* subjects as if they were born in any county of *England*; second, that the separation of the colonies from the parent state, and the subsequent acknowledgment of their independence by the Crown of *Great Britain*, did not make aliens of those persons who before that event were natural born subjects, but that they preserved the same right to inherit, purchase, and transmit land, as if such separation had not taken place; and third, that by the common law, or by force of the statute 25 *Edw.* 3. st. 2. or by operation of 4 *Geo.* 2. c. 21. the children of those persons who were born within the *United States* of *America*, since their independence has been acknowledged, have the same right to inherit land in this country as their parents had. The first proposition (which will not be disputed on the other side) is clearly established by the statute 6 *Geo.* 3. c. 12. by which it is declared "that the colonies and plantations of *America* have been, are, and of right ought to be, subordinate unto and dependent upon, the imperial Crown and Parliament of *Great Britain*; and that the King's Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons of *Great*

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Britain, in parliament assembled, had, hath, and of right ought to have, full power and authority, to make laws and statutes of sufficient force and validity to bind the colonies and people of *America*, subjects of the Crown of *Great Britain*, in all cases whatsoever." The second proposition, which is the most material, is to be made out by referring, first, to the situation of the two contracting powers, at the time of the separation of the colonies from the mother country; secondly, to the language of the treaty by which that separation took place; and thirdly, to the provisions of acts of parliament passed subsequently. In the first place, the situation of the contracting parties shews that it never could have been the intention of either to make the other aliens. Many of the *American* colonists held lands in this country, and therefore it is quite absurd to suppose that such persons would be desirous of breaking off with the mother country, and thereby deprive themselves of the character of natural born subjects of *Great Britain*. On the other hand, it never could have been in the contemplation of the government of this country to treat the inhabitants of *America* as aliens, for if that were the intention, then the effect must have been to treat as aliens those faithful subjects, who, throughout the struggle for *American* independence, had strenuously adhered to the cause of the mother country. The relative situation of both parties, and their mutual interests, therefore clearly shew, that a complete alienation between the two nations was never contemplated. It is impossible then, without some express compact or agreement to the contrary, to contend that the consequence of the declaration of *American* independence, was to make the natives of each country aliens to the other, and that the inhabitants of the colonies ceased thereby to be natural born subjects, and were deprived of those rights which, as individuals, they had before enjoyed. A nation can be separated into independent parts only by one of three modes; cession on the part of the Crown; conquest by a foreign power; or mutual agreement between the Sovereign and the people. What would be the effect of a separation by any of these three means?

As to the first, it cannot be contended that if the Crown thought proper to cede to a foreign power the sovereignty of its colonies, the persons living in those colonies, and who were before the cession natural born subjects of this kingdom, would be deprived of their birth-right, and made aliens, so as to make them forfeit all the lands and tenements which they might hold in *England*, when they themselves had no power of throwing off their allegiance. Would it not be a most singular proposition, that because the Crown, from reasons of state, at the termination of a war, should think proper to cede one of its colonies, that persons born in the colony whilst it formed part of this kingdom, and capable of inheriting lands here, should cease to be *Englishmen*, and become ipso facto aliens, and have their property wrested from them by an act of state? When *Florida* was ceded to Spain by this government, in the same year of the *American* independence, the inhabitants of that province, who were natural born subjects of the *British* Crown, did not by such cession become aliens. Mere cession then will not produce alienation. [*Bayley*, J.—Suppose an island taken by the arms of this country in time of war, and all the inhabitants thereby become subjects of this kingdom, and there are children born who become natural born subjects, and the island is then ceded to the power from which it was originally taken, do you mean to contend that the grand-children will all be natural born subjects of *Great Britain*, and have heritable blood?] That may be so; the principle may only extend as far as grand-children. The seizure of the island may only be momentary, or for so short a time as not to produce those consequences. It is laid down by the text-writers, that a man who turns traitor to his country does not thereby become an alien; nor does he disnaturalize himself, if he be a *British* subject, although he takes up his permanent residence in a foreign country: this will not be disputed. Then, will conquest effect this alienation? Suppose a colony of this country to be captured by a foreign power, do the inhabitants [illegible] eo instanti aliens to this

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kingdom? It would be a most unreasonable proposition to say that they did. There are many authorities in the old books applicable to the ancient colonies of *England*, and which, indeed, formed material appendages to the Crown, such as *Guienne*, *Gascoigne*, *Anjou*, &c., in which it was held that the inhabitants did not become aliens by the conquest of those provinces by *France*. Without referring more particularly to those authorities at present, it is sufficient to say, that conquest alone is not sufficient to produce alienation; and, therefore, where a person has been once a natural born subject of *Great Britain*, the capture of his country by a foreign power does not deprive him of his right to inherit property in *England* as a *British* subject. Then, in the third place, supposing alienation cannot be effected by cession or conquest, may it be done by mutual compact between the kingdom and the colony which declares its independence? It will be difficult to find any authority on the other side to support the affirmative of that proposition. That question must rest on general principles only. Possibly the ground taken will be, the extreme inconvenience which must arise—the great confusion which must be produced if it is held, that the natives of the *United States* are, for the purposes of heritage, to be treated as natural born subjects of *Great Britain*; for, it will be asked, how can a man owe a double allegiance? The answer to all this is, that these are matters of inconvenience only; consequences arising from the nature of things, and for which the legislature only can provide. By the law, as it at present stands, persons cannot become aliens by mutual compact between the Sovereign on the one hand, to dispense with the allegiance of his subjects, and the subjects on the other, not to require the protection which it is the duty of a sovereign to afford to them. Any inconvenience arising from this general and indisputable principle, can be remedied only by the High Court of Parliament itself. Judges must judge according as the law is, not as it ought to be, as is laid down by *Vaughan*, C. J. in *Craw* v. *Ramsey* (a), where the question [illegible] whether naturalization in

(a) Vaugh. 285.

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Ireland would naturalize a person in *England*. The general principles laid down in that case are also strongly applicable to the present, and go the whole length of sustaining this part of the argument. There is nothing inconsistent in a man owing a double allegiance. Nothing was more common whilst the King of this country held lands in *France*; and certainly people were then frequently entangled about the question of their allegiance. This is taken notice of in 1 Hale, P. C. 68. where *Bracton*, lib. v. c. 24. is cited. Considering, therefore, the situation of the two countries at the time the treaty of independence was signed, there is no reason for contending that the mere fact of Mr. *Ludlow* remaining in *America*, after the separation was acknowledged, made him cease to be a *British* subject, and become an alien. If, then, any such alienation took place, it could only be, secondly, by force of the treaty between the two countries. Now looking through the treaty of the 3d *September*, 1783, from the beginning to the end, there is not a syllable from which it can be collected that the *Americans* intended to give up their right to hold lands in this country. The first article is a simple declaration of the independence of the states of *America*, and a relinquishment on the part of his *Britannic* Majesty of all dominion and right of soil in *America*; but there is nothing to shew that *America* was to become a foreign country to this. The effect of the first article was not to make the *Americans* aliens in the legal sense of the word, and put an end to all rights of soil which the citizens of that country might have here. It professes to give them something for which they were contending, but it does not take from them any thing which they had before. The second article is only a declaration of what shall thenceforth be the boundaries of the *United States*. The third contains regulations as to the mode of exercising the right of fishing by the natives of the two countries. By the fourth it is "agreed, that the creditors on either side shall meet with no unlawful impediment to the recovery of the full value, in sterling money, of all bonâ fide debts hereto-

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fore contracted. As far as that article goes, it affords no argument whatever against the position now contended for. All that it meant was, that there should be no obstruction to the recovery of bonâ fide debts owing from *Englishmen* and *Americans* respectively; but it never meant to say that a plea of alienage would be a good plea, if a party had the opportunity of putting such a plea on the record in either country. Then the fifth article contains a distinct recognition on the part of the government on both sides, that the inhabitants of the two countries may hold lands in the other. It is agreed thereby, "that Congress shall earnestly recommend it to the legislature of the respective states, to provide for the restitution of all estates, rights and properties, which have been confiscated, belonging to *real British* subjects."—Now the probability is, that the words "*real British* subjects," were introduced there to shew some distinction, in the minds o those who framed the treaty, between those *British* subjects who took up arms against the *British* Government, and those who adhered to it. But it shews, at all events, that there were still in *America, British* subjects, i. e. persons not aliens to this country, who held lands in *America*. Why then should this treaty make provisions for protecting real *British* subjects, if the moment their lands were restored, they were to cease to hold them? If the natives of *America* became aliens after the signature of the treaty, those *Americans* who held lands in this country must have forfeited them, and they would go to the crown. It would be a strange thing, that by force of this treaty they were still to retain their lands in this country, and yet by construction of law they should not be able to enjoy them. It is a mistake, therefore, to suppose that the effect of this article of the treaty is to make real *British* subjects, then residing in *America,* aliens to the mother country. If real *British* subjects are to hold lands in *America* by this treaty, why are not the same subjects to hold land in the country of which they are subjects? Is it not probable that some provision would have been made for such a contingency, if the con-

tracting parties to the treaty had not contemplated the possibility, that *Americans* then entitled to land in *England*, would inherit such land as a matter of course? It is quite manifest that when this article was framed it was not the intention of the *British* government to take away property in this country belonging to *Americans*. Indeed it is well known as matter of history, that it was not the wish of the government of *Great Britain* that the natives of *America* should become aliens, and hopes were entertained to the last that they would become reconciled to the mother country. If such had been the intention, it cannot be doubted that some expression would have been found in the treaty which would operate as a complete alienation. The fifth article, which is the most important article in the treaty on this point, is silent upon that subject, and leaves it open to the fair and natural inference, that it was never the intention so to alienate the *Americans* as to deprive private individuals of their right to lands to which they had title in this country. The sixth article provides "that there shall be no future confiscations made, nor any prosecutions commenced against any person or persons, for or by reason of the part which he or they may have taken in the present war, and that no person shall on that account suffer any future loss or damage either in his person, liberty, or property." The effect of this article is to afford protection in future, for property belonging to persons who might have taken part in that war which terminated in the declaration of *American* independence. Can it then be said that property, of the description now in question, can be taken from a person on the ground of his being an alien? To hold that this action is not maintainable on that ground, would be directly against the faith of this clause of the treaty. The father of Mrs. *Thomas*, therefore, had a right to take this property as a *British* subject. This article contains nothing to prevent his inheriting on the ground of alienage, and it is clear that he had heritable blood in him. None of the other articles of this treaty bear upon the present question. It is important then to direct the attention of the Court to the statute 37 *Geo.* 3.

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c. 97. which was passed for the purpose of carrying into effect the treaty of peace made, in 1794, between *Great Britain* and the *United States*. The 24th section of that statute recites the 9th article of that treaty, by which it was agreed "that *British* subjects who then held lands in the territories of the *United States*, and *American* citizens who then held lands in the dominions of His Majesty, should continue to hold them according to the nature and tenure of their respective states, and titles therein, and might grant, sell, or devise the same, to those whom they should please, in like manner as if they were natives, and that neither they nor their heirs or assigns, should, so far as might respect the said lands and the legal remedies incident thereto, be regarded as aliens;" and then proceeds to enact, "that all lands, tenements and hereditaments, in the kingdom of *Great Britain*, or the territories and dependencies thereto belonging, which on the 28th *October*, 1795, were held by *American* citizens, shall be held and enjoyed, granted, sold, and devised, according to the stipulations and agreements contained in the said article; any law, custom, or usage to the contrary notwithstanding." Thus then in the year 1796, the legislature of this country declared that *Americans* holding lands in *Great Britain*, held them as *British* subjects and not as aliens; and that corroborates the argument that the framers of the original treaty never contemplated that, by the separation of the colonies from the parent state, the inhabitants of either were to become aliens to each other. There being no reason, therefore, to infer from the language of the original treaty, that *Americans* were to be considered aliens, but a direct contrary inference being to be drawn from it, then it follows that the question involved in the second proposition, must be decided by the municipal law of the country, and which will be found not to militate against it (*a*). According to Lord *Coke* (*b*), the country where the party is born, is not conclusive of the question of alienage, "for a man may be born out of the realm of *England*, yet within the liegeance. And he that is born

(*a*) *Calvin's* Case, 7 Rep. 1.

(*b*) Co. Lit. 129 a.

within the King's liegeance, is called sometimes a *denizen*, *quasi deins neè*, born within, and thereupon in *Latin*, called *indigena*, the King's liege man; for *ligeus* is ever taken for a natural born subject." Lord *Coke* defines allegiance to be "the true and faithful obedience of a liegeman or subject to his liege lord, or sovereign. Ligeantia est vinculum fidei: ligeantia est legis essentia: 1. Originaria, sive naturalis, sive nata; and this is always absolute and incident inseparable. Nemo patriam, in quâ natus est, exuere, nec ligeantiæ debitum ejurare possit, &c." The question of alienage, therefore, does not depend upon the place of a man's birth, but upon what allegiance he owes. The father and mother of Mrs. *Thomas* were natural born subjects of *Great Britain*, and it was not in their power to put off their allegiance; nothing short of an act of the legislature can denaturalize a man, inasmuch as an alien can only be naturalized by such means. Even the solemn act of abjuration shall not destroy the allegiance which a man owes his natural sovereign. The relation of sovereign and subject is indissoluble, except by an act of the legislature. The father and mother of this lady, therefore, continued natural born subjects of *Great Britain* at the moment of her birth. For this, *Calvin's* case (*a*) is an express authority. In that case *Calvin* was born in *Scotland*, after the union of the two countries under *Jac.* 1. The question was, whether, being postnatus, he was entitled to inherit land in *England*, and it was resolved by all the Judges, "that all those that were born under one natural obedience, while the realms were united under one sovereign, should remain natural born subjects, and no aliens, for that naturalization, due and vested by birth-right, cannot, by any separation of the Crown, afterwards be taken away; nor he that was by judgment of law, a natural born subject at the time of his birth, become an alien by such a matter ex post facto." The principle contended for, as established in that case, was afterwards alluded to and recognized by Lord *Mansfield*, in *Campbell* v. *Hall* (*b*). It being admitted that before the treaty of 1783, *England* and *America* were one

(*a*) 7 Rep. 1. (*b*) Cowper, 204.

country, and that at that time Mrs. *Thomas's* parents were natural born subjects, it follows, according to Lord *Coke*, and the decision in *Calvin's* case, that they remained natural born subjects, and not aliens, after the separation. The statute *de prærogativis regis*, 17 Edw. 2. c. 12. may also be called in aid of the present argument. After the King of *France* had wrested from the *English* Crown certain provinces in *France*, which afterwards became reunited to the Crown, that statute was passed, by which it was declared that the persons then living in those provinces, were to be treated as *British* subjects, notwithstanding several generations had passed away; and *Staunforde*, in his Pleas of the Crown, fo. 39, commenting upon that branch of the statute, says, "By this branch it should appear, that at this time men of *Normandy*, *Gasgoine*, *Guienne*, *Anjou*, and *Brittainny*, were inheritable within this realm, as well as *Englishmen*, because that they were some time subject unto the Kings of *England*, and under their dominion until King *John's* time, as is aforesaid, and yet after his time those men (saving such whose lands were taken away for treason) were still inheritable within this realm, till the making of this statute. And in time of peace between the two Kings of *England* and *France*, they were answerable within this realm if they had brought any action for their lands and tenements, as it doth plainly appear by *Bracton*, in his sixth book, in the title, *De exceptione quia alicui gena*." The statute *de prærogativis regis*, therefore, is a strong legislative exposition of the principle contended for, that although the government of a country may be changed, yet even the remote descendants of persons who were natural born subjects originally, cannot cast off their allegiance, and consequently that although there was a change in the government of *America* by the treaty, yet those who were alive at that time, did not cease thereby to be *British* subjects, or lose their right to enjoy lands in this country. The second proposition having been thus proved, then thirdly, the question is, whether the children of natural born subjects of *Great Britain*, born in the United States of *America* since the declaration of independence, have the

same right to inherit lands in this country as their parents had. The affirmative of this proposition is proved either by the common law, or by operation of the statutes 25 *Edw.* 3. st. 2. *Year Book* 1 *Ric.* 3. fo. 4. *Calvin*'s Case, 7 *Ann.* c. 5. s. 3. and 4 *Geo.* 3. c. 21. which last statute was passed to explain the third section of the 7 *Ann.* for naturalizing foreign Protestants. After reciting that section, whereby it was enacted, that the children of all natural born subjects, born out of the ligeance of her majesty, should be deemed, adjudged, and taken to he natural born subjects of this kingdom to all intents, constructions, and purposes whatsoever, it proceeded to enact, "That all children born out of the ligeance of the crown of *England* or of *Great Britain*, or which shall hereafter be born out of such ligeance, *whose fathers were or shall be natural born subjects* of the crown of *England* or *Great Britain*, at the time of the birth of such children, respectively, shall and may, by virtue of the said recited clause in the said act of the 7 *Ann.* and of this present act, be adjudged and taken to be, and all such children are hereby declared to be natural born subjects of the crown of *Great Britain* to all intents, constructions, and purposes whatsoever." The only difficulty arising upon this statute as to its inapplicability to the present case, is as to the words "whose fathers were or shall be natural born subjects of *Great Britain*, at the time of the birth of such children respectively." It will be said, on the other side, that inasmuch as the separation between *America* and this country had taken place before the birth of Mrs. *Thomas*, and as her father then owed no faith or allegiance to the crown of *Great Britain*, this statute cannot apply to the present case. But that is not the fair construction of the words of the statute. The words "natural born subject at the time of such birth," cannot point to any subsequent determination of the character of a natural born subject, and in that case make the parent cease to be a natural born subject. It is impossible to understand from the letter of this statute that it was the intention of the legislature to disnaturalize a person who was a natural born subject of this

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country, or leave to subsequent consideration who shall be a natural born subject. In support of this case, there are decisions to be found in the Court of Session in *Scotland*, which go the whole length of the present argument. *Stewart* v. *Hoome* (a), *Sheddon* v. *Patrick* (b), and *Scott* v. *Browne* decided in the same Court in *February*, 1810. To these authorities and arguments may be added, in conclusion, the observation of Lord C. B. *Hale*, in *Collingwood* v. *Pace* (c), where he says, "The law of *England*, which is the only ground and must be the only measure of the incapacity of an alien, and of those consequential results that arise from it, hath been always very gentle in the construction of the disability, and rather contracting than extending it so severely."

Parke, contrà. The lessor of the plaintiff, Mrs. *Thomas*, having been born in *America* after the *British* colonies in that country had thrown off their allegiance, and after the sovereign of this country had recognized their independence, is to be considered as an alien, and therefore cannot inherit lands in *England*. At common law, as distinctly laid down in *Calvin*'s case (d), all persons who are born out of the kingdom are aliens, unless three incidents unite: first, that both the parents are under the actual obedience of the king; second, that the place of the birth of the child be within the king's dominions; and third, that at the time of the birth the child cannot be a subject born of one kingdom that was under the legiance of the sovereign of another kingdom. It cannot be disputed that in 1784, when Mrs. *Thomas* was born, *America* was a separate state, and that the inhabitants thereof did not owe any allegiance to the king of *Great Britain*. Upon this point *Folliott* v. *Ogden* (e) is an express authority. It is clear, therefore, that, primâ facie, Mrs. *Thomas* is an alien, and it lies upon the other side to satisfy the Court that the case falls within some

(a) 6 Morison's Decisions, 4649, affirmed in the House of Lords in 1807.
(b) Id. Appendix, 9.
(c) 1 Vent. 427.
(d) 7 Rep. 6 36.
(e) 1 H.Bl. 135. S.C. in error. 3 T. R. 726. See Id. 584.

statute law to the contrary. The only statutes which have been referred to upon this subject are 25 *Edw.* 3. st. 2. 7 *Anne*, c. 5. and 4 *Geo.* 2. c. 21., but these do not help the plaintiff, for these require that the father shall be a natural born subject of *Great Britain* at the time of the birth of the child. Here it is clear that when Mrs. *Thomas* was born, her father had ceased to be a subject of *Great Britain*, and therefore those statutes are inapplicable. The question is not whether, if Mr. *Ludlow* had come to *England*, after the declaration of *American* independence, and become domiciled here, he could be treated as an alien, but whether after he continued to reside in *America* until his death, and therefore must be taken to have adhered to the new order of things, he can be considered as retaining the character of a natural born subject of *Great Britain*. The doctrine of alienation must certainly be taken from the municipal law of this country: but if this question were to be decided by the law of nations, there are abundance of authorities to shew that Mrs. *Thomas* is to be considered as an alien. By the law of nations every person has a right, of his own accord, to throw off his allegiance to his government. That is considered as a proposition of universal law, by *Vattel*, lib. i. c. 19. s. 220. By the Code *Napoleon*, and even by the old law of *France*, a person might expatriate himself by taking the oath of allegiance to the sovereign of another state. In the state of *Virginia* a law to the same effect is in existence. But without referring to the law of nations, it is sufficient to shew, that by the municipal law of this country Mrs. *Thomas* is an alien. That law is founded on the feudal law, on the doctrine of the relation which exists between the sovereign and his vassal. In *Calvin*'s case (*a*) ligeance is defined to be "duplex et reciprocum ligamen quia subditus regi tenetur ad obedientiam ita rex subditi tenetur ad protectionem." The same definition is given by Lord *Ellesmere* in the same case, p. 64. In *Forster*'s Crown Law, 183, it is said, "The duty of allegiance, whether natural or local, is

(*a*) 7 Rep. 9.

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founded in the relation the person standeth in to the Crown, and in the privileges he deriveth from that relation." Though in *Co. Lit.* 129, *a.* it is laid down as a maxim, that "nemo patriam in quâ natus est exuere nec ligeantiæ debitum ejurare possit," it does not therefore follow, that the relation of sovereign and subject may not be dissolved by mutual compact. Many instances are put in *Calvin's* case to shew that allegiance may be temporary, and Lord *Coke* himself puts the cases of attainder and abjuration of the realm as means whereby it may be affected. It is admitted, and indeed cannot be disputed, that an act of parliament may dissolve this relation. One instance is the 5 *G.* 1. c. 27. s. 3. with respect to artificers going abroad, and out of the King's protection, by which it is declared, that "they shall thenceforth be, and be deemed and taken to be, aliens, and shall be out of his Majesty's protection." There are other instances to be found in which a dissolution of the relation between subject and sovereign has taken place. 4 *Rymer's Collection of Treaties*, 337, and 2 *Chalmer's Collection of Opinions*, 485. As to the effect of conquest, it is laid down by Lord *Mansfield*, in *Campbell* v. *Hall* (a), that "the inhabitants of conquered provinces are to be considered as subjects, not as aliens." The converse of that proposition must be equally true, that if any territory be conquered from *Great Britain*, and the subjects chuse to remain there, they by right of conquest become the subjects of the new sovereign. But these questions fall very short of the present, because here the sovereignty of *America* is relinquished, and not by the sovereign merely in his own right, but by an act of parliament enabling him to make a treaty with his former *American* subjects. The 22 *Geo.* 3. c. 46. gives this power to the Sovereign; and by the treaty entered into in pursuance of it, the King acknowledges all the united provinces to be free, sovereign and independent states, and treats with them accordingly. This treaty is afterwards ratified and confirmed by 37 *Geo.* 3. There is, therefore,

(a) Cowp. 204.

a complete recognition of the Sovereign's authority to do this. Then, on the part of the subject, what is done to shew his acquiescence? It is found by the special verdict, that Mr. *Ludlow*, the father of Mrs. *Thomas*, continued to reside in *America* after the treaty was signed, and died there (*a*). Then he must be considered as a party to the treaty, and bound by the acts of the state in which he is voluntarily living. He became as much a subject to the new government as the natives of *Surinam* after their allegiance had been transferred by *Car.* 2. to the *Dutch* government in 1667 (*b*). According to Mr. Justice *Blackstone*, in 1 *Comm.* 569. this dissolution may take place by the mutual concurrence of the prince and the subject. If so, can there be a stronger proof of concurrence than, first, in the recognition by the Sovereign of the independence of a certain class of his subjects, and, second, in the act of those subjects throwing off their allegiance? It is said on the other side, that nothing is to be found in the treaty of 1783 from which it is to be collected that it was the intention of the parent state to consider the inhabitants of the colonies, after the separation, as aliens; and it was endeavoured to extract some expressions from it, to shew that they still continued *British* subjects. Very little attention to the treaty will shew that a contrary inference is to be drawn. First, as to the right of fishing, the people of the *United States* are to continue to enjoy that right as they did before. Why, if they were to be considered in future as vested with all the rights of natural born subjects, such a provision would have been quite unnecessary. The same observation applies to the provision for the restitution of all estates, rights, and properties which had been confiscated belonging to real *British* subjects. The object of that article was only to provide, that persons who had a right to lands in *America* should not lose them, and that if they had a title to lands before the rebellion, they should be restored to them, if the legislature of the respective states should chuse so to

(*a*) Though it was not stated as a fact in the special verdict, it was now admitted that Mr. *Ludlow* resided in *America* until the time of his death.

(*b*) See 2 *Chalmer's* Col. 485. for the debate between Sir *W. Temple* and *De Witt*, upon the cession of the province of *New York* for *Surinam*, to the *Dutch*.

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do. The 24th section of the statute 37 *Geo.* 3. c. 97. is open to the same observation, for unless that provision had been made by the legislature, the necessary inference must have been, that *American* subjects would have been considered aliens. The object of that section was merely to make a special provision in favour of those *American* citizens who actually or legally held lands in the territory of his Majesty; and in respect to such persons, it confines the privilege to them, their heirs, and assigns. If the argument on the other side could prevail, and if the effect of 7 *Ann.* and 13 *Geo.* 2. c. 7. s. 7. was such as is represented, the consequence would be, to make the whole of the *American* population *British* subjects—to throw on them the obligations, and to give them all the privileges of *British* subjects, and to make every *American* who may hereafter bear arms against this country, subject to the penalties of high treason. The argument must be pushed to that length or it cannot avail the plaintiff. It may be admitted, that this is the case when persons entangle themselves in a double allegiance. If a *British* born subject were to go over to the continent, and become a subject of the King of *France*, placing himself in the situation of owing a double allegiance, and a war broke out between the two countries, he would be in every view in an inconvenient situation, but such inconveniences should be narrowed rather than extended. Upon general principle, therefore, it is clear, that the allegiance of the *British* colonists was put an end to by the operation of the treaty of 1783, wherein the *United States* of *America* were declared free, sovereign and independent; and that Mr. *Ludlow*, who must be taken to have consented to what was done by the *American* Congress, must be bound by that treaty, and must, from that moment, have become an alien. Although this is the first time that this question has come before the Court for its decision, yet there have been persons of great authority who have given their opinion upon it. In *Somerville* v. *Somerville* (a), Lord *Redesdale*, when Attorney-General, said (and his opinion was not disputed by the

(a) 5 Ves. jun 781

Bench or at the Bar) that "the domicile every child has on its birth, must remain until that is lost and another acquired. Until another is acquired, that one cannot be lost. After the peace of 1783, such of the *Americans* as chose to remain subjects of the States, ceased to be part of the *British* nation, and lost their character of *Britons*." This was stated as a clear proposition of law, not admitting of any dispute. Upon this occasion it may not be improper to refer also to decisions in the *American* Courts, not because they are binding on the decision of this Court, but to shew in what light the question has been considered in the *United States* as to the rights of *British* subjects born in that country before the declaration of independence. It would be a most singular state of things if, on the other side of the *Atlantic*, all persons born before the treaty of 1783 should be excluded from inheriting land in that country, and yet that the Courts on this side the water should hold them capable of inheriting land in *England*. The decisions in the *American* Courts have always been, that *British* subjects, born before the revolution are equally incapable with those born subsequently to that event, of inheriting or transmitting the inheritance of land to the subjects of this country. This position is expressly laid down in *Bright* v. *Rochester* (a), decided in 1822 in the supreme court of *Pennsylvania*. One point decided was that a *British* subject born before or after the revolution, was equally incapable of inheriting land by descent. It was there held that the treaties of 1783 and 1794 only provided for titles existing at the time of those treaties, and not to titles subsequently acquired. That case therefore is an express decision upon the point now under consideration. The fourth resolution in *Calvin's* case does not bear upon the present question, for here the separation of the two countries was by an act of law, in which both the parties were concurring. Then the statute *de prerogativis regis*, is equally inapplicable, because

(a) 7 Weaton's Reports.

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the whole of that statute is merely a declaration of what the king's prerogative is, and does not bear upon the question now under consideration, inasmuch as the crown of *England* had never by any formal act, as in this instance, relinquished its right to the allegiance of the inhabitants of those provinces in *France* which had formerly been annexed to the crown of *England*. Lord *Coke*, in *Calvin*'s case, distinguishes between the cases of persons born in actual obedience to the crown of *England*, in those territories, and those who were born after the crown had ceased to be in the actual possession, and only had a legal right to the possession of those territories. So that in any view, the question which arises in this case could never have arisen with respect to the inhabitants of those provinces in *France* which had belonged to the crown of *England*. The *Scotch* cases referred to on the other side do not afford any light upon the present question. The first was a question of dower, and is very shortly reported, and all that is to be collected from the judgment is, that the Lord Ordinary repelled the objection of alienage; but under what circumstances that objection was made does not appear. Then in the second case, which came before the House of Lords in 1807, the question of alienage was not considered in any way whatever, and there was certainly no decision as to this point. The point there was whether a child born abroad could not be legitimated by a marriage in *Scotland*, so as to give him title to an estate in that country. These decisions, therefore, do not bear upon this question. Upon the whole then the court is now called upon, for the first time, to decide that the children of *Americans*, born after the separation of the two countries, are to enjoy the privileges of natural born subjects of *Great Britain*. Agreeing with the argument on the other side, that allegiance is indissoluble, still that must be taken sub modo; both parties must be consenting to the dissolution. Here there is evidence that both sides did consent, namely, by the treaty of 1783, whereby Mr. [illegible]*ow* ceased to be a *British* subject; and if that be so,

then it follows as a consequence that his daughter must be an alien. Looking to the statute 7 *Anne*, explained as it is by 4 *Geo.* 2. it is manifest that the legislature meant a natural born subject, to be a person who had done no act to relinquish that character. It is obvious from these statutes that the parent must be a subject of *Great Britain*, at the time of the birth of the child, otherwise the child cannot be a natural born subject. Therefore whether Mr. *Ludlow* himself had or had not forfeited the privilege of a *British* born subject, at all events Mrs. *Thomas* cannot be considered a natural born subject of *England* at the time of her birth. Mr. *Ludlow*'s national character may be put out of the question as far as respects the alienage of Mrs. *Thomas*, because the treaty of 1783, by which the sovereignty and independence of the *United States* was acknowledged, determines the question as to her, inasmuch as her father, by remaining in *America* until the time of his death could neither inherit nor acquire a right to land in *England*. If Mr. *Ludlow* had chosen to come to this country and domicile himself here, the question might perhaps have been different, but during his continuance in *America* the character of a natural born subject of *Great Britain* no longer existed. Under these circumstances the defendant is entitled to judgment.

Tindal, in reply. The main argument on the other side is, that the bond of allegiance between sovereign and subject may be dissolved by mutual agreement; but the instances adduced in illustration, shew most forcibly that nothing but an act of the legislature can effect that object. Such was the case in *Rymer*'s Collection of Treaties, where the King, *Edward* II. *with the consent of parliament*, gave up the allegiance of the people of *Scotland*. That was an act of the legislature. So in the very case of *America* and *Great Britain* it was necessary to pass the 22 *G.* 3. c. 46. to enable the King to treat with his *American* sub-

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jects, and absolve them of their allegiance, which at common law he could not do; but that act may be looked at in vain to find a syllable which says that any privilege which *American* subjects, who then had a right to hold land in *England*, possessed, is taken away from them. Then as to the case of the cession of the colony of *Surinam* by *Charles* II. in lieu of the colony of *New York*, that is no authority on this occasion, because it is only the instance of a debate between two statesmen upon a matter of international law, where any colony is ceded to another; but determining no principle, and forming no rule for governing dissimilar cases. It is admitted, on the part of the plaintiff, that from the moment the Treaty of 1783 was signed, *America* became a separate state; but the argument is, that there is nothing in that treaty which took away from *American* subjects what they had before; the effect of it is only to give them that for which they had been contending with the mother country. The decision from *Weaton*'s Reports of Cases in the Supreme Court of *Pennsylvania*, is at least counterbalanced by other decisions in *America*, of a contrary import. In *M'Ilvaine* v. *Coxe* (*a*), decided in the Supreme Court of the United States in the year 1808, it was held that a person born in the colony of *New Jersey* before 1775, who resided there till 1777, but who then joined the *British* army, and who had ever since adhered to the *British*, claiming to be a *British* subject, and who had demanded and received compensation from that government for his loyalty, is not an alien, and may take land by descent in *New Jersey*. This, therefore, is a case in which the *American* courts did not hold that the separation of the two countries had the effect of denaturalizing the inhabitants. The Judge, in delivering the opinion of the Court, said, " But it is insisted that the Treaty of Peace operating upon his condition at that time or afterwards, he became an alien to the state of *New Jersey* in consequence of his election then made to

(*a*) Mr. Justice Cranch's Reports, vol. iv. 209.

become a subject of the King, and his subsequent conduct confirming that election. In vain have we searched that instrument for some clause or expression which, by any implication, could work this effect." He then refers to the Treaty, which is the source to which this Court must look for information, and observes, "It contains an acknowledgment of the independence and sovereignty of the *United States* in their political capacities, and a relinquishment on the part of his *Britannic* Majesty of all claim to the government, propriety, and territorial rights of the same. These concessions amounted, no doubt, to a formal renunciation of all claim to the allegiance of the citizens of the *United States*. But the question, who were at that period citizens of the *United States*, is not decided, or in the slightest degree alluded to in this instrument; it was left, necessarily, to depend upon the laws of the respective states, who in their sovereign capacities had acted authoritatively upon the subject. It left all such persons in the situation it found them, neither making those citizens who had, by the laws of any of the *States*, been declared aliens, nor releasing from their allegiance any who had become, and were claimed as citizens. It repeals no laws of any of the *States* which were then in force and operating upon this subject; but on the contrary it recognizes their validity, by stipulating that Congress should recommend to the *States* the reconsideration of such of them as had worked confiscations," &c. Admitting that the treaty has the effect of making the *Americans* a different nation, and therefore foreigners, yet it does not prevent them from being natural born subjects. It must be conceded, indeed, that there are cases in the *American* courts in which it has been held that persons born in *England* before the year 1775, and who have never gone to *America* after the separation, are not entitled to hold land in that country, which fell to them after the separation took place. The reason, however, of those decisions must be considered as so unjust, as to shake their validity, namely, that *England*

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never owed allegiance to *America* (a). If the effect of the Treaty had clearly been to sever the two countries and make

(a) Vide *Dawson* v. *Godfrey*, 4 Cranch, 321. The case there was this:—*R. Lee*, a citizen of the United States, in 1793 died seised in fee of a tract of land called *Argyle, Cowall* & *Horn*, situated in that part of the district of *Columbia* which was ceded to the United States by the State of *Maryland*. Mrs. *Dawson*, the lessor of the plaintiff, would be entitled to the land by descent, unless prevented by the application of the principle of alienage. She was born in *England* before the year 1775, always remained a *British* subject, and was never in the United States. Upon error brought in the Supreme Court, in 1808, the Court delivered the following opinion:

"This case rests upon the single question, whether a subject of *Great Britain*, born before the declaration of independence, can now inherit lands in this country? The general doctrine is admitted that in the State of *Maryland*, in which the land lies, an alien cannot take by descent; but it is contended upon the doctrine laid down in *Calvin*'s case that the rights of the antenati of *Great Britain* formed an exception from the general rule. The point decided in the case of *Calvin* was that a *Scotsman*, born after the Union, could inherit lands in *England*. It is evident that this case is not directly in point, for the only objection here to the right of recovery did not exist in *Calvin*'s case, as, whether in *England* or in *Scotland*, he was equally bound in allegiance to the King of *Great Britain*. It would be a contradiction in terms to contend that *Dawson* or his wife ever owed allegiance to a government which did not exist at their birth. It is upon a supposed analogy, therefore, and the reasoning of the judges in *Calvin*'s case, that the argument for the plaintiff is founded. In the two cases of *Coxe* v. *M'Ilvaine* and *Lambert* v. *Paine* in this Court, this doctrine was very amply discussed, and this case is submitted on those arguments. The counsel there contended that the relation of the postnati of *Scotland* (after the Union) to the subjects of *Great Britain*, was identically the same with the antenati of *Great Britain* (before our Revolution) to the citizens of this country, and that the community of allegiance at the time of birth, and not the existing state of it when the descent is cast, is the principle upon which the right to inherit depends. The latter proposition presents the weak point of their argument; for the community of allegiance at the time of birth and at the time of descent both existed in *Calvin*'s case. We have no doubt that the correct doctrine of the *English* law is, that the right to inherit depends upon the existing state of allegiance *at the time of the descent cast*. And that the idea that it depends upon community of allegiance at the time of birth, is a consequence that follows from the doctrines that a man can never put off his allegiance, or be deprived of the benefits of it but for a crime. Community of allegiance, once existing,

the inhabitants of *America* aliens to this, it is impossible but that some instance must have occurred in which the question had been raised, but no instance has been cited where any *American* subject has been deprived of his land in this country. The absence of any such instance clearly shews what the general notion of the law has been upon the question, and therefore, for the reasons originally pressed in argument, the plaintiff is entitled to judgment.

The case was argued on a former day, when the Court said they would take time to consider the question, and judgment was now delivered by

ABBOTT, C. J.—This was an ejectment brought for the recovery of certain lands in the county of *York*, whereof *Elizabeth Harrison* had lately died seised. *Frances Mary Thomas* claimed as heiress at law, and according to the facts stated in the special verdict, she is entitled so to claim, if she be a person capable of claiming lands in *England* by descent. She is the daughter of *Elizabeth Harrison*, and the grand-daughter of *Peter Harrison*; *Peter Harrison*, the grandfather, was a native of *England*, and went to *America*, where he resided for many years and held the office of Collector of his Majesty's Customs, and died in 1775. His daughter, *Elizabeth*, was married in 1781 in

must, upon these principles, exist ever after. Hence it is that the antenati of America may continue to inherit in *Great Britain*, because we once owed allegiance to that crown. But the same reason does not extend to the antenati of *Great Britain*, because they never owed allegiance to our government. This idea will be best elucidated in the following manner. If an action be commenced in *England* by an antenatus of *America* for the recovery of land, the plea of *alien born* could not be maintained, because inconsistent with the fact; nor would a plea of the severance of these states avail the defendant, because the act of his government, independent of any crime of his own, does not deprive the plaintiff of his civil rights, although it may release him from the obligation of allegiance. But if a suit of the same kind is instituted here by an antenatus of *Great Britain*, the plea of alien born could be maintained, for the plaintiff never owed allegiance to our government," &c.

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Rhode Island to *James Ludlow*, a native of *New York*, who was born before the year 1776, and continued to live in *America* and died there. *Elizabeth* also continued to live, and died there in 1790. *Frances Mary* was born in *America* in *Rhode* Island in 1784, and the question is, whether she be a person who, at the time of her birth, according to the expression used in the statute 4 *G*. 2. c. 21. "was a natural born subject of the crown of *Great Britain*." The case was very ably argued before us, and all the authorities that bore upon the subject were cited; but we do not think it necessary to enter into them. Some question was raised as to the meaning of the words "whose fathers were or shall be natural born subjects of the crown of *Great Britain* at the time of the birth of such children," which are the words of the statute I have just referred to. We think the sense of the words is very plain. Natural born subjects are mentioned as distinguished from subjects by dominion or any other mode. A child born out of the kingdom is not entitled to claim as a natural born subject, unless the father be at the time of the birth, not a subject only, but a subject by birth. The two characters of a subject and a subject by birth must unite in the father. *Thomas Ludlow*, the father of *Frances Mary*, was undoubtedly born a subject of the crown of *Great Britain*, in a part of *America* which was at the time of his birth a *British* colony; but upon the facts stated, we are of opinion that he was not a subject of the crown of *Great Britain* at the time of the birth of the daughter, *Frances Mary*. She was born after the independence of the colony was recognized by the crown of *Great Britain*, and after the colony had become part of the *United States*, and the inhabitants of *Rhode* Island became citizens of *America*, and her father, by continuing in that state, equally became a citizen. This recognition of the independence of the United States of *America* was made, or rather confirmed, on the 3d *September*, 1783, by a treaty entered into between his late Majesty, and the United States of *America*. The preliminary articles that were

afterwards introduced to form this Treaty were signed on the 30th *November*, 1782, after passing the act of 22 *G*. 3. c. 46. whereby his Majesty was authorized to conclude a treaty or truce with certain colonies of *America* therein named. Between the signing of the articles and the definitive treaty, several acts were passed mentioning the United States of *America* and the citizens of those States. The distinct colonies or plantations are no longer named in the 23 *G*. 3. c. 26. 39. and 80. But the acts of the *United States* are mentioned and treated there as the acts of an independent nation. So that if the sanction of the British legislature could be thought necessary to give validity to this treaty, such sanction has been abundantly given.

Then, what is the effect of this Treaty? So far as regards the question in its present form, by the first article of the Treaty in 1783, his Majesty acknowledged the United States of *America*, [enumerating by name all the several countries that had in all the former acts been mentioned as colonies,] to be free, sovereign and independent States. He treats with them as such, and relinquishes all claim to the government, propriety and territorial rights of the same, and every part thereof. It is impossible to agree with the observations of the plaintiff's counsel that this is not to be considered as a relinquishment of the right of soil or territory. It is a relinquishment of the government of the territory and of the authority over the inhabitants; it is a declaration that the state shall be free, sovereign and independent; it is a declaration that the people composing the state shall no longer be considered the subjects of the sovereign by whom such declaration is made.

It was contended, however, that by some of the subsequent articles of this treaty or a subsequent treaty in 1794, ratified by the statute 37 *G*. 3., persons in the situation of the lessor of the plaintiff were considered to be the children of natural born subjects. But we think no such inference can be drawn from either the third, fifth, or sixth articles of

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the treaty of 1783, which appear to be the only articles that have any bearing on this question. The third article gives the right of fishing on certain coasts. On the part of the defendant it was said, if they were considered *British* subjects, they would have this privilege in that character. At all events it is clear that this privilege confers no right beyond that so possessed. By the fifth article it is agreed that the Congress shall recommend to the legislature of the respective states, to provide for the restitution of all estates, rights and properties which have been confiscated, belonging to real *British* subjects; and also that persons of every description shall have liberty to go into every part of the *United States*, and reside there twelve months. The sixth article provides that there shall be no future confiscations made, nor any prosecution commenced against any persons by reason of the part they may have taken in the war. Now it is impossible to extend the effect of these two articles beyond the particular lands that might be restored or recovered, or claimed by virtue of them, and their effects lead to that precisely. With regard to future rights or the rights of other persons, they are not changed or enlarged.

Then as to the subsequent treaty in 1794, it provides only that the *British* subjects who hold lands and the *American* citizens who then held lands, within the dominions of his Majesty, should continue to hold them, and might grant, sell, or demise the same as if they were the natives of those states, and that neither they, nor their heirs or assigns, should, so far as might respect the same lands and the legal remedies incident thereto, be considered as aliens. That article, therefore, was in terms confined to lands then held. In general it distinguishes *British* subjects from alien citizens, and the provision that persons should not be considered as aliens with regard to lands, seems to us to indicate very plainly that they were considered aliens with regard to all other lands. The inconvenience that must ensue from considering the great mass of the inhabitants in a country to be

at once citizens and subjects of two distinct and independent states, and owing allegiance to two sovereign powers, was well commented upon in the argument at the bar. If the language of the treaty could admit of any doubt as to its effect, the consideration of these inconveniences would have great weight with us; but as we think that the effect of the treaty is manifested by its language, we do not consider it necessary to observe further upon that topic. But for the reasons already given, we are all of opinion that *Thomas Ludlow* had ceased to be a subject of the crown of *Great Britain*, and had become an alien thereunto before the birth of his daughter *Frances Mary*, and consequently that she is an alien, and incapable of inheriting lands in *England*. The judgment must therefore be entered for the defendant. It is a great satisfaction for us to know that our judgment is conformable to the decisions of the Supreme Court of *Pennsylvania*, upon a similar question brought before that court on the claim of a *British* subject to lands in *America*.

Judgment for the defendant.

The King *v.* H. Perkins.

Where the modern charter of a corporation, consisting of a mayor, eleven aldermen, eighteen assistants, and eighteen common councilmen, after directing that the corporate officers should for ever *thereafter be nominated and chosen out of the free burgesses*, proceeded to nominate the first corporate officers, and amongst the common councilmen was named one who was not at the time of his nomination a *free burgess*:—Held, that he was entitled, by virtue of his nomination, to all the privileges, and to exercise the office of a free burgess of the borough.

JESSOPP moved for a rule calling on *Horatio Perkins*, Gent. to shew cause why an information in the nature of a quo warranto should not be filed against him, for exercising without lawful authority the office of a free burgess of the borough of *Colchester*, in the county of *Essex*. By a modern charter granted in the 58 *Geo.* 3. it was ordained, that the men *free burgesses* of the said borough should be for ever thereafter one body politic and corporate, in deed and in name, by the name of "the Mayor and Commonalty of the

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borough of *Colchester*, in the county of *Essex*." The charter then declared that for ever *thereafter* there should and might be within the borough, to be nominated and chosen out of the free burgesses in the manner after expressed, one who should be called the mayor, eleven others who should be called the aldermen, eighteen others who should be called the assistants, and eighteen others who should be called the common council of the borough; which eleven aldermen, eighteen assistants, and eighteen of the common council, from time to time, should be counselling, aiding, and assisting to the mayor for the time being, in all causes, matters, and business, touching or in any wise concerning the borough. The charter then declared that if any of the assistants appointed by those presents, or thereafter to be chosen by virtue of the same, should die, be removed from or resign his office, it should be lawful for the free burgesses of the commonalty of the borough for the time being (except as thereinafter excepted) or the major part of them, to chuse and prefer one of the eighteen common council men, for the time being, into the place of an assistant in the room and stead of such assistant so dead, removed, or having resigned, to supply the number of eighteen assistants, and so from time to time as often as the case should so happen, for ever. The charter then nominated the first and modern mayor, eleven persons to be the first and modern other aldermen, eighteen persons to be the first and modern assistants, and eighteen others to be the first and modern common council. Amongst the persons named as the eighteen common council, were several who were not at the time of nomination free burgesses of the borough. The affidavit in support of the present motion, stated that *Horatio Perkins* was one of the persons nominated in the charter to be eighteen common council—but that he was not a free burgess of the borough; that within six years last past he was elected to the office of an assistant of the borough, and has ever since continued to act as such assistant, although all the assistants of the borough are, by the charter, directed to be elected out of the free bur-

gesses; and that within the last three years he has claimed to be, and has acted and voted as a free burgess of the borough, although he was never entitled thereto, or admitted or sworn as such free burgess, unless his nomination in the said charter as one of the common council of the borough, and his being sworn into such office, can be so considered. The question intended to be raised by the present motion was, whether by the nomination of Mr. *Perkins* in the charter to the office of common councilman, he was virtually a free burgess of the borough, although he was not in fact a free burgess at the time of his nomination, or whether, as the duties of the office of common councilman were defined by the charter, and might, as was submitted, be executed by any person though not a free burgess, the Court would assume that the office of free burgess was conferred on him by his appointment as a common councilman, though it is no where in the new charter stated that the persons so nominated are intitled to the privileges of free burgesses. It was now contended that the mere nomination in the charter of Mr. *Perkins* by the Crown to be a common councilman did not constitute him a free burgess, or confer upon him the privileges of a free burgess, some of which were the right of voting for coroners, and for representatives of the borough in parliament. The Court were informed that this was not a hostile application, but that all the parties interested in the question were desirous of having the opinion of the Court upon it.

Per Curiam.—We are of opinion then, that Mr. *Perkins*, having been nominated in the charter as a common councilman, and having subsequently accepted the office, he is by necessary implication entitled to all the privileges of a free burgess. There is no difference of opinion on the bench upon the question.

Holroyd, J.—The charter directs that all future common councilmen shall be elected from amongst the free

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burgesses at large. A common councilman then is a free burgess and something more. Mr. *Perkins* has been named by the Crown to an office to which, from the time of the acceptance of the charter, free burgesses only are eligible. Then can it be contended that by such acceptance Mr. *Perkins* was not elected to all the privileges and clothed with all the authority with which every future common councilman will be invested? (a)

Rule refused (b).

(a) *Littledale*, J. was gone to chambers.

(b) Vide *Rex* v. *Abell*, ante, vol. iii. 390. where another question arose upon the same charter.

Robinson v. Vale.

Plaintiff recovered damages and costs against defendant in an action of trespass, and signed final judgment on the 29th *January*. On the 23d of that month defendant committed an act of bankruptcy, and a commission issued against him on the 31st of same month, and on 3d *May* he obtained his certificate: Held, that the damages and costs were a bonâ fide debt within the meaning of 46 G. 3. c. 135. s. 2. and proveable under defendant's commission, and having been arrested on a ca. sa. for the damages and costs, the Court discharged him out of custody.

TRESPASS for taking plaintiff's goods. On not guilty pleaded, the plaintiff recovered a verdict and damages at the *Middlesex* Sittings after the last *Michaelmas* Term. On the 23d *January* last the defendant committed an act of bankruptcy, and a commission issued against him on the 31st of the same month, and on the 3d *May* he obtained his certificate. On the 29th *January* the plaintiff had signed final judgment in the action, and arrested the defendant on a capias ad satisfaciendum on the 17th *April*, for the damages and costs.

Denman, C. S. obtained a rule nisi on a former day to discharge the defendant out of custody, on the ground that the damages and costs were a debt proveable under the commission, and that the defendant was protected by his certificate.

Wilde, Serjt. now shewed cause. The damages and

costs of an action of trespass are not a debt within the meaning of the 46 *Geo.* 3. c. 135. s. 2. and consequently could not be proved under this defendant's commission, even admitting that the time of signing final judgment would have relation back to the time at which the verdict of the jury was given. The words of that statute are "that in all cases of commissions of bankruptcy, all and every person with whom the bankrupt shall have really and bonâ fide contracted any debt or debts before the date and suing forth of such commission, which, if contracted before any act of bankruptcy committed, might have been proved under such commission, shall, notwithstanding any prior act of bankruptcy may have been committed by the bankrupt, be admitted to prove such debt or debts, and to stand and be a creditor under such commission to all intents and purposes whatever, in like manner as if no such prior act of bankruptcy had been committed by such bankrupt," &c. (*a*). Now the debts alluded to in this statute clearly mean such debts as are matter of contract, and not damages which may be given by a jury in action for a tort. But independently of this objection, it is clear that supposing this to be a debt within the meaning of this statute, still it did not become due until the 29th *January* when the final judgment was signed, which was six days *after* the act of bankruptcy was committed. Under these circumstances this rule must be discharged.

Denman, in support of the rule, was stopt.

The COURT was clearly of opinion that a judgment, even in an action for a tort, is a debt within the meaning of the statute, and proveable under the defendant's commission, although the final judgment be not signed until after the act of bankruptcy committed.

BAYLEY, J. observed—The circumstance of the judgment not being signed until after the act of bankruptcy was com-

(*a*) See 49 G. 3. c. 121. s. 1. and 2.

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mitted makes no difference. The judgment was the consequence of a tort committed by the bankrupt before the act of bankruptcy, and therefore the debt, by relation back to the cause of action, is a debt existing previous to the date of the act of bankruptcy and commission. As such it is clearly proveable within the meaning of the statute, the object of which was to protect the bankrupt's estate against the proof of dishonest or fictitious claims, between the date of the act of bankruptcy and the suing forth of the commission. I am of opinion that this was a bonâ fide debt within the meaning of the statute.

Rule absolute (*a*).

(*a*) See *Exparte Charles*, 14 East, 197; *Eparte Hill*, 11 Ves. jun. 646; *Buss* v. *Gilbert*, 2 M. and S. 70; *Walker* v. *Barnes*, 1 Marsh, 346; *Blogg* v. *Phillips*, 2 Campb. 139; *Beeston* v. *White*, 7 Price, 209; 3 P. Wms. 399; and *Lee* v. *Goodlad*, ante, 350.

END OF EASTER TERM.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH

IN

TRINITY TERM,

IN THE FIFTH YEAR OF THE REIGN OF GEORGE IV.

MEMORANDA.

SIR *John Richardson*, Knight, one of the puisne Judges of the Court of Common Pleas, retired from the Bench in consequence of ill health.

Stephen Gaselee, Esq. one of His Majesty's Counsel learned in the law, was appointed one of the puisne Judges of the Court of Common Pleas, in the room of Sir *John Richardson*, Knt.; and being called to the degree of a Serjeant at Law, gave rings with the motto "*Bonis legibus, judiciis gravibus.*" Towards the close of this Term he took his seat on the Bench.

R. Spankie, Esq. of the Honorable Society of Inner Temple, Barrister at Law, was called to the degree of a Serjeant at Law, and gave rings with the motto "*Bonis legibus, judiciis gravibus.*"

John Adams, Esq. of the Honorable Society of Middle Temple, Barrister at Law, was called to the degree of a Serjeant at Law, and gave rings with the motto "*Bonis legibus, judiciis gravibus.*"

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The KING *v.* The INHABITANTS of CATESBY.(a)

Where a parish certificate was granted by two persons, who described themselves on the face of it to be, "the *only* churchwarden, and the *only* overseer of the poor of the parish:" Held, after a lapse of 63 years, in the absence of evidence to the contrary, that the Court would intend, first, that the parish had by custom but one churchwarden; and second, that there had been originally two overseers, but that one had died, and consequently, that the certificate was valid, as having been granted by a majority of the existing body of overseers, within the meaning of the Certificate Act, 8 & 9 *W.* 3. c. 30.

TWO Justices, by their order, removed *George Cox*, his wife and their child from the parish of *Badby* to the parish of *Catesby*, both in the county of *Northampton*. On appeal, the sessions confirmed the order, subject to the opinion of this Court upon a case which stated,

That *George Cox*, *Ann*, his wife, and their child *Mary Ann*, were removed by an order of justices from the parish of *Badby*, in the county of *Northampton*, to the parish of *Catesby*, in the same county. This order was appealed against; and on the hearing of the appeal, the respondents produced a certificate, of which the following is a copy:—

Northamptonshire to wit.—In pursuance of a late act of parliament, intitled "An Act for supplying some defects in the law for the relief of the poor of this Kingdom," We, *William Goodman*, the only churchwarden, and *Edward Webb*, the only overseer of the poor of the parish of *Catesby*, in the said county of *Northampton*, do hereby certify the churchwardens and overseers of the poor of the parish of *Badby*, in the said county of *Northampton*, that we do own and acknowledge *Thomas Cox* the younger, of *Badby* aforesaid, butcher, and *Mary* his wife, and *Richard*, *John*, and *Elizabeth*, their children, to be inhabitants legally settled in our said parish of *Catesby*. And we do hereby oblige ourselves, the said churchwarden and overseers of the poor of *Catesby* aforesaid, and our successors for the time being, to receive and provide for the said *Thomas Cox* and *Mary* his wife, and the said *Richard*, *John*, and *Elizabeth*, their children, and all other the children which the

(a) A warrant under the Royal Sign Manual, having issued ten days before the end of *Easter* Term, pursuant to 3 *Geo.* 4. c. 102. the puisne Judges of this Court sat in a room adjoining the *Guildhall* at *Westminster*, from the 1st to the 16th *June*, both days inclusive, for the dispatch of business, when this and the following cases were decided.

said *Thomas Cox* may hereafter have by the said *Mary* his wife, whenever he, she, they, or any of them, shall become chargeable to the parish of *Badby* aforesaid, or be forced to ask relief of the same, in case he the said *Thomas Cox* and *Mary* his wife, and their children, shall not in the mean time obtain and acquire to him, her, or themselves, a legal settlement in the parish of *Badby* aforesaid, or elsewhere. In witness whereof we, the said churchwarden and overseers of the poor of *Catesby* aforesaid, have hereunto set our hands and seals the 20th day of *May*, in the year of our Lord 1761. Sealed and delivered in the presence of us,

Tho. Stevens. *Wm. Goodman* (L.S.)
William Claridge. *Ed. Webb* (L.S.)

Northamptonshire to wit. — We, two of his Majesty's Justices of the Peace of and for the county of *Northampton*, do allow of the above, and we do also certify that *William Claridge*, one of the witnesses to the signing and sealing of the above-written certificate, has made oath before us, that he did see the churchwarden and overseers of the poor of *Catesby* aforesaid, severally sign and seal the certificate, and that the names of the said *Thomas Stevens* and *William Claridge*, set as witnesses to the sealing and delivery of the same certificate, are of the proper hand writing of the said *T. S.* and *W. C.* respectively. Given under our hands the 22d day of *May* in the year of our Lord 1761.

John Parker. *John Andrew.*

They also proved that the *Thomas Cox* in the certificate mentioned, had a son named *Thomas*, who was born after the certificate was granted, and that the pauper *George* was the son of such last mentioned *Thomas*. The respondents, in a previous appeal under the same certificate, having given evidence of relief of the said *Thomas Cox* in the certificate mentioned, whilst residing in *Badby*, understood that in this appeal such evidence was admitted by the counsel for the appellant; but the counsel for the appellant do not

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consider that they made such admission. The question for the opinion of the Court is, whether the certificate above set forth is valid in point of law, inasmuch as it purports to be granted by two parish officers, describing themselves as "the only churchwarden and the only overseer of the poor of the parish of *Catesby*."

Reader, *G. Marriott*, and *Ellis*, in support of the order of Sessions. The certificate was originally granted to the grandfather of the pauper, and therefore if the grandson had acquired a settlement in the certifying parish, he would have avoided the certificate, and then *Rex* v. *Darlington* (a) would come in point, and would govern the present case. But here the son of the certificated person, that is the father of the pauper, has acquired a new settlement, and it is a derivative settlement from him that the pauper now claims. The sole difficulty in this case arises from the introduction into the certificate of the word "only;" for if that had been omitted, *Rex* v. *Hinckley* (b) would be parallel to, and would decide this case. But taken with this disadvantage, the present falls within the principle laid down in that case, namely, that every thing is to be intended in favor of the certificate; and all that the Court have to intend here is, that two overseers were appointed, one of whom died before the instrument was executed. Undoubtedly, if one only was appointed, the certificate is void; but that cannot be assumed, and it is not proved; the fair presumption is, that two were appointed, that one died, and that the survivor signed the certificate, as he then might legally do. It will be said, that by law every certificate is void which is not signed by two overseers, but there is no foundation for that doctrine. In *Rex* v. *Clifton* (c), a certificate signed by one overseer was held to be void, but there it was in evidence that only one had been appointed, and that was the ground of the decision there. In *Rex* v. *Earl Shilton* (d) it was

(a) 4 T. R. 797.

(b) 12 East, 361.

(c) 2 East, 175.

(d) 1 B. & A. 275.

held that the 43 *Eliz.* c. 2. does not require absolutely two churchwardens; and that an indenture binding out a poor apprentice by one churchwarden, where by custom there was but one, and one overseer, was good. In that case undoubtedly there was evidence of a custom in the parish to have one churchwarden only, which there is not here; but that may have been the custom in this parish, and after such a lapse of years, and in the absence of proof to the contrary, the Court will, in favor of the certificate, presume the fact to be so.

Holbech and *Adams* contrà. The certificate came out of the custody of the respondents, and therefore the appellants could not be expected to produce any evidence respecting it, especially after the lapse of sixty-three years. The insertion of the word "only" is fatal to the instrument. No reasonable intendment can be made in favor of it. But granting that two overseers were appointed and one died, a certificate signed by one overseer and one churchwarden is bad, because the statutes 43 *Eliz.* c. 2. and 8 & 9 *W.* 3. c. 30. require that it shall be executed by the majority of the legal body. This becomes more manifest upon reference to the 17 *G.* 2. c. 38., which provides for the emergency of the death of one of the parish officers, and empowers the survivors to fill up the vacancy, clearly shewing that until the vacancy is filled up, the survivors cannot perform any legal act. *Rex* v. *Clifton* and *Rex* v. *St. Margaret's, Leicester* (a), are both distinguishable from the present case; because in neither were there any data upon which the Court could found any legal presumption. The argument on the other side rests on the assumption that there were originally two overseers: so that the Court, in order to support this certificate, are asked to intend, most unreasonably, first, that a particular individual was alive, and was appointed to a particular office in the month of *March*, and then that he was dead in the month of *May*. There is no

(a) 8 East, 334.

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ground for any such intendment; the word "only" does not convey any idea of survivorship; construed fairly, it plainly indicates that there never had been more than one overseer, and then the certificate, it is admitted, is void. In *Rex* v. *All Saints, Derby* (a), it was held that the words of the statute of *Elizabeth* were not satisfied by a compulsory binding by two persons styling themselves *churchwardens* and *overseers*, who had been appointed the overseers of the parish at a time when one of them was *churchwarden*; which latter continued the churchwarden for about two months afterwards, when the other overseer was appointed sole churchwarden in his place. In that case there was evidence of the original appointment of both persons as overseers; but still it was held that the description given of themselves in the indentures of apprenticeship would not satisfy the statute. The principle of that case is in point with this. Without a very far-fetched and unreasonable intendment of important facts, and a very unusual and strained construction of the word "only," this certificate cannot be supported; and there is no reason why the Court should travel so far out of the ordinary rules of intendment in this particular case.

Bayley, J.—Upon the principle established in several cases it seems to me that this is a good certificate. In *Rex* v. *Hinckley*, Lord *Ellenborough* and *Le Blanc*, J., both say, that if any intendment can by law be made to support an indenture of apprenticeship, the Court must make that intendment. In that case the indenture was produced on one side, and there was no evidence to impeach it on the other, and *Le Blanc*, J., says, "the question then is, whether by any intendment of law such an indenture can be good?" and both Judges say, it might be considered good "by intending that there was a custom in the particular parish to have only one churchwarden." There are two acts of parliament which bear upon this question, and which contain similar language;

(a) 13 East, 143.

the 43 *Eliz.* c. 2. s. 5. which relates to parish apprentices, and the 8 and 9 *W.* 3. c. 30. which relates to the granting of certificates. Both these acts require that there shall be the concurrence of the churchwardens and overseers "or the major part of them," to give validity to the indentures and certificates respectively, and therefore decisions upon the one throw a light upon the other; and notwithstanding the statute 17 *Geo.* 2 c. 38. s. 3. which gives to the Justices a power of appointing an additional overseer when one shall die in the course of the year, I think that this case is to be considered as it would have been prior to the period when that act passed. Generally speaking there are two churchwardens in every parish; but, by custom, there may be one only. By law there must be two overseers originally appointed, and an appointment of less than two is, upon the face of it, bad; but if by custom there may be only one churchwarden appointed, and if there be two overseers duly appointed, death may reduce the number to one, and then the question would be whether prior to the statute 17 *Geo.* 2. that churchwarden and that overseer might not do the act in question as constituting the major part of the persons originally appointed. In the case of *Rex* v. *St. Margaret's, Leicester,* there was a very plain and decisive objection to the certificate, because in that case there was only one overseer originally appointed, and it was with reference to that fact, that the language of Lord *Ellenborough* and *Lawrence,* J. there is to be applied. They said that the certificate act 8 & 9 *W.* 3. c. 30. requires that a certificate shall be granted under the hands and seals of the churchwardens and overseers of the parish, or the *major* part of *them.* It has since been decided in *Rex* v. *Hinckley* and *Rex* v. *Earl Shilton,* that though the word in the statute is "churchwardens," yet, by custom, if one only be appointed, that one will be sufficient to satisfy the word churchwardens; but it being clear that by law less than two overseers cannot be appointed, there must have been originally two overseers; and in the case of *Rex* v. *St. Margaret's, Leicester,*

it was stated as a fact that there was one only. In *Rex* v. *Clifton* the certificate was stated to be under the hand and seal of *J. W.* " only overseer of the poor of the township," and therefore the Court decided, not upon the language of the certificate itself, but upon the fact that originally there had been an appointment of one only. The cases of *Rex* v. *Hinckley* and *Rex* v. *Earl Shilton* both establish this proposition, that if a certificate, or the binding of a parish apprentice, be by one churchwarden and one overseer, it is good, and it is only because in this case the certificate describes *Edward Webb* as " the only overseer," that we are at liberty to assume that there was originally a bad appointment. Now let us consider the law of presumption, with reference to that point. Are we to presume that it was non rité actum? The statute says that the Justices are to appoint two overseers. Are we then to presume that the Justices have deviated from their duty and appointed one only, or are we not rather to presume that two overseers had been duly appointed, and that one of them had died? The law will presume that a party has conformed to the law; and if we are to make any presumption, it is ut res magis valeat quam pereat. Between these two, I say, that presumption ought to prevail which assumes that the Justices have conformed to the law; and therefore I think we ought rather to support the instrument than destroy it. Upon this principle it appears to me, we are at liberty to assume that in this case *William Goodman* was by the custom of this parish the only churchwarden appointed; that *Edward Webb* was the only surviving overseer, that he duly granted the certificate in the character in which he is described upon the face of the instrument, which he would not have done had he not been regularly and duly appointed; and that we are bound to intend, according to the language of Lord *Ellenborough* in *Rex* v. *Hinckley*, that there had been originally a good and valid appointment of two, there being no evidence to shew what the appointment was, or to rebut the inference arising from the face of the certificate

itself. For these reasons I am of opinion that as against the parish which has granted this certificate, we ought to hold that this overseer was duly authorised to do the act in question, and therefore that the Order of Sessions must be confirmed.

Holroyd, J.—I am also of opinion that the Order of Sessions must be confirmed. I think, upon the authorities which have been cited, and likewise upon the principles which ought to govern us, assuming that the authorities did not exist, that this certificate was good in point of law, or at least that the Sessions might legally draw the conclusion, and intend from the circumstances which appeared in evidence, that it was a good certificate. The certificate was granted on the 17th *May*, 1761, by two persons who were at that time to be taken as the only existing parish officers. It is submitted to by the parish to whom the pauper is sent, as a good certificate, and now after a lapse of 63 years, it is for the first time called in question. If any intendment or presumption can legally be made in favor of the validity of such an instrument, it must be in a case of this description; and I think that the justices had authority in point of law to presume such facts as would make it a good certificate, assuming such facts to have had existence. That such facts might really exist there seems no doubt; at least upon the authority of the cases cited. It is perfectly clear that by custom there may be only one churchwarden in a parish. There must be two overseers appointed in addition to the churchwardens; and then according to the 43 *Eliz.* c. 2. such persons shall be called overseers of the poor, and are to take charge of them. Now upon the face of this instrument, I think we are to take it, that the person who is called "the *only* overseer" of the poor, was, in point of law, the survivor of two; for unless there had been two persons appointed, who, together with the churchwardens, were to be overseers of the poor, the statute of *Elizabeth* would not have been satisfied. Indeed

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the description of himself as "the *only* overseer" would not be correct, unless there had been two overseers originally appointed, and therefore it is a fair presumption, arising from the face of the certificate, that he was the survivor of two. Suppose an issue had been directed to try simply whether he was or was not the overseer of the parish; if it was shewn that there had been only one originally, the issue must have been found that he was not the overseer of the parish, and if the onus was to be thrown upon those who are called upon to support the certificate (even assuming that it had been submitted to for an hundred years), it could not by legal intendment be considered a good certificate. I think, however, that the magistrates were abundantly warranted in presuming, as they have done, that there had been an appointment of two overseers originally, and that if there was by custom only one churchwarden, they had a right to presume the fact in favor of the certificate. If so, then the certificate must be considered as signed by a majority of those who would be the original existing body. Whether it is absolutely necessary for the purpose of executing their functions, that the majority of the original existing body should continue to exist or not, is a question which we need not decide, because if that was necessary the 17 *Geo.* 2. would not have been passed, for then, in case the original churchwardens and overseers had been reduced below a majority, as for instance, if there were originally four, and they were reduced to two, all their functions must be at an end during the residue of the year, until that statute had passed. It is, however, unnecessary to decide that question. In this case the Sessions have drawn, as they had a right by law to do, the proper conclusion from the presumption of facts, in holding that this was a legal certificate, and as they have done that, I think we should not be justified in reversing their order. But, independently of what they have done, I am of opinion that, according to the authorities of *Rex* v. *Hinckley* and *Rex* v. *Earl Shilton*, we are bound by law to

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make every intendment that can reasonably be made in favor of the certificate. Acting upon the maxim, "res magis valeat quam pereat," we ought to conclude that this certificate has been legally granted by persons who describe themselves as "the only churchwarden and the only overseer," which the latter person could not have done with propriety unless there had been two originally appointed; and inasmuch as there might have been originally only one churchwarden by custom, we must presume, particularly after an acquiescence of 63 years, that the persons who signed the certificate were a majority of the existing body, and consequently that this was a valid certificate.

Littledale, J.—I am of the same opinion. A certificate signed by one churchwarden and one overseer alone, would certainly not be sufficient, unless the law would intend something more. But it appears to me, that upon the face of this instrument, we are at liberty to intend those circumstances which are necessary to give it validity. First, with respect to the churchwarden, I think there is no difficulty in intending that he was such a churchwarden as the custom of the parish would authorise, inasmuch as by custom there may be only one churchwarden in a parish. Then, secondly, with respect to the overseer, though a certificate signed by one overseer would be bad, still we are at liberty to assume, from the language of this certificate, that there were originally two overseers appointed, but that one had died after the appointment, and before the certificate was granted. It is said, we are called upon to intend death instead of the continuance of life. So we are; and I think we are at liberty to do so, until the contrary be shewn. But we are placed in the situation of chusing between two intendments, a particular, and a general intendment; first, that a party should be presumed to live when once shewn to be alive; and second, that every thing shall be presumed to be right according to law. Now the question is, which of these two intendments is to prevail; because it is impossible that both can operate. The intendment that every

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thing is to be presumed to be right according to law, is a general intendment, and, I think, ought to prevail, especially in a case of this description, until the contrary is shewn. In the cases of *Rex* v. *Clifton* and *Rex* v. *St. Margaret's, Leicester,* the question of intendment did not arise, because the facts did not warrant it. There the appointment of one overseer was nugatory, being contrary to the statute. But here, after the lapse of sixty-three years, the description of the overseer may warrant us in presuming an original appointment of two overseers, and enable us to intend that one of them had died. The cases of *Rex* v. *Hinckley* and *Rex* v. *Earl Shilton,* are authorities to warrant the Court in saying, that every thing must be presumed to be rightly done, until the contrary is proved. So in *Rex* v. *Morris* (a), which was the case of an appointment by Justices of one overseer for a hamlet in a particular parish, in which the question was, whether only one overseer could by law be appointed, Lord *Kenyon* says, "This Court has invariably made a distinction between orders of Justices and convictions, and said, that every thing is to be intended in support of the former;" and speaking of the objection there, as to the supposed illegality of the appointment of one overseer, he said, "we are not left to conjecture that no other person was appointed overseer of this place, for it appears on the order of Sessions, that this was an appeal of one of the overseers." Now, when we apply what that learned judge says to the present case, that every thing should be intended in support of the order of Justices, I think it will justify our opinion on the present occasion. This certificate is a public document, and though not framed by Justices of the Peace, yet being the act of the parish officers, the Court, for the same reason that it intends every thing in favor of an order of Justices, will intend every thing in favor of an instrument made by parish officers. On the whole, therefore, I am of opinion that this is a valid certificate.

Order of Sessions affirmed.

(a) 4 T. R. 550.

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Where an appeal against a poor's rate was entered at the *Midsummer* Sessions and respited until the *Michaelmas* Sessions, and then further respited, at the instance of the appellant, till the *Epiphany* Sessions, four days previously to which the respondents gave notice that they would not oppose the appeal, and the appeal was accordingly allowed without opposition: Held that the appellant was entitled to costs as upon an appeal which had been "heard and determined" within the meaning of 17 *Geo.* 2. c. 38. s. 4.

AT the General Quarter Sessions holden at the castle of *Norwich* in and for the county of *Norfolk*, on the 17th *July*, 1822, before, &c. an appeal was entered by the Reverend *Augustine Bulwer*, D.D. against a certain rate and assessment bearing date the 3d *June*, 1822, for the relief of the poor of the parish of *Cawston*, the hearing of which appeal was respited till the next sessions; and at the next sessions holden for the said county, the appeal was further respited, on the motion of the appellant, to the sessions to be holden for the said county on the 15th *January* last, when the respondents gave up all opposition to the appeal, having given four days previous notice to the appellant that they would do so; and at the said last named sessions the said rate was quashed on the motion of the appellant's counsel, and the Court allowed to the appellant his costs. The counsel for the respondents contended that the Court had no power to award costs, as the appeal had not been heard and determined, and thereupon the Court granted the respondents a case for the opinion of the Court of King's Bench, as to the question of their jurisdiction in this respect.

E. Alderson, in support of the order of Sessions, was stopt by the Court.

Manning, contrà. The Sessions have no power to award the costs of an appeal against a poor's rate, unless the appeal is *heard and determined*. By 17 *Geo.* 2. c. 38. s. 4. an appeal is given to persons aggrieved in the cases therein mentioned, and the sessions are thereby "authorised and required to receive such appeal, and to hear and finally *determine* the same, &c.; and the said justices may award and order to the party for whom such appeal shall be *deter-*

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mined, reasonable costs, in the same manner that they are impowered to do in case of appeals concerning the settlement of poor persons," by 8 *W*. 3. Now it cannot be said that this appeal was *heard and determined*. In *Rex* v. *The Justices of Essex* (a), it was decided that the Quarter Sessions have no authority to award costs under 17 *G*. 2. c. 38. unless an appeal has been entered and determined, for the determination of the appeal is a condition precedent to their power to give costs, the words of the act being "may award to the party for whom such appeal *shall be determined*, reasonable costs," &c. and therefore the Court refused a motion for a mandamus to the justices commanding them to hear evidence for the purpose of giving costs against one who, having given notice of appeal against a poor's rate, countermanded it the night before the Sessions. That case is in point; here, a four days notice was given to the appellant, and the respondents need not have gone to the sessions to incur further expense. This appeal has not been heard and determined within the sense and meaning of the statute, and therefore the order of sessions, allowing costs, must be quashed.

BAYLEY, J.—This case is too plain for argument. The case cited is perfectly distinguishable from this. There the appeal had not been entered; here the appeal was entered, and twice respited; and therefore there is no analogy between the two cases. I am of opinion that this appeal was "heard and determined," in the fair sense and meaning of those words. In the first place, as to the hearing; the appellant was bound to prove his notice of appeal before he could entitle himself to costs, and having done so, that would be a hearing: then, in the second place, the allowance of an unopposed appeal would be a final determination of it, so as to satisfy the words of the statute. It is said that the appellant need not have gone to the Sessions,

(a) 8 T. R. 583.

because notice was given four days before, that it was not intended to resist the appeal. If notice had been given by the respondents at the same time that they meant to pay the costs already incurred, then the appellant need not have gone to the sessions; but he is obliged to go there in order to get his costs.

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Holroyd, J.—By allowing the appeal, the sessions "determined" it. Suppose the justices, notwithstanding the respondents' notice that they did not mean to support the rate, entertained a doubt of the propriety of allowing the appeal, and desired to hear what the appellant could say upon the subject, would not that be a hearing? Could it be said that that was only a hearing on one side, and that both sides must be heard before the costs ought to be allowed? Surely not. I think the order must be affirmed.

Littledale, J. concurred.

Order of Sessions confirmed.

The King v. The Inhabitants of Ampthill.

Merely renting a tenement of 10*l.* a year, without actual payment, will not prevent the removal of the tenant under the 35 *Geo.* 3. c. 101. if he is actually chargeable.

If a pauper, who has the means of paying his rent and sustaining himself and family by the sale of his goods, applies to the parish for relief, and the overseers (without fraud on their part) are compelled by an order of justices to relieve him, he is actually chargeable and removeable if he has not acquired a settlement.

The bonâ fide renting a tenement at 10*l.* a year and paying the rent *after* a pauper has become chargeable will not confer a settlement under 59 *Geo.* 3. c. 50. *Quære.* Whether the justices at sessions are at liberty to inquire into the real value of a tenement where there has been a bonâ fide hiring and actual payment of a 10*l.* rent under the statute.

TWO Justices by their order, dated 5th *August*, 1823, removed *J. Asprey* with his wife and five children from the parish of *St. Botolph*, in the town and county of *Cambridge*, to the parish of *Ampthill*, in the county of *Bedford*. The Sessions, on appeal, confirmed the order, subject to the opinion of this court on the following case.

The pauper, a rope maker, being previously settled by estate in the parish of *Ampthill*, came with his family to

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reside, at *Midsummer*, 1822, in a house in the parish of *St. Botolph*. He had hired it of one *Mitchell*, for 10*l.* a year. He put his own furniture therein, worth 15 or 16*l.* He continued to live in it above a year, and in *July* last, being much distressed, he applied to the parish officers of *St. Botolph* for relief, who refused to give him any till ordered by a magistrate so to do, after being summoned to shew cause why they did not. They then gave the pauper fourteen shillings on the 31st *July*, according to such order. The tax collector during this month had seized a bed worth 1*l.* for a quarter's tax of three shillings in arrear, and the pauper's wife had sold some furniture, but what remained in the house at this time was worth 14*l.* a circumstance which was not communicated to the magistrate by the overseer when the order for relief was made. The day after this relief, *Mitchell* called for his rent of 10*l.* and gave the pauper a fortnight to pay it in. Soon after this, the pauper and his family were removed to *Ampthill* under the above order of removal. He then applied to one *Furze*, an auctioneer, to buy his furniture, to enable him to pay his rent. *Furze* went to *Cambridge*, valued it at 13*l.* 3*s.* (exclusive of his tools, which were worth 5*l.*) and agreed to buy them for 10*l.* which sum he paid to the pauper, who kept the key of the house all the time, and returned to it about the 14th *August*, on which day *Mitchell* had sent a person to distrain for the rent; but no distress was taken, because the bailiff, *Furze*, and the pauper went together to *Mitchell's*, and the rent was paid by the pauper with the 10*l.* he received from *Furze*. Another auctioneer had been employed to sell some of the furniture under the direction, and according to the inventory of *Furze*, and sold it for 3*l.* 13*s.*; and after this sale the remainder of the furniture and the tools might be worth 6*l.* Without the tools the remaining furniture might be worth 1*l.* The Sessions decided that the house was not of the value of 10*l.* and confirmed the order of removal, subject to the opinion of this court, whether the pauper was liable to be removed from the parish of *St. Botolph*.

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Storks in support of the order of Sessions. There are three questions intended to be raised on the other side; first, whether the pauper was removeable even though actually chargeable, having been resident on a tenement of 10*l.* a year at the time of the removal; second, whether the pauper took and rented a tenement of 10*l.* a year within the meaning of the 59 *Geo.* 3. c. 50; and, third, whether it was competent for the Sessions to go into the question of value in the face of a bonâ fide contract for a tenement of 10*l.* a year. As to the first point, it is perfectly clear, that if the pauper did not rent a tenement within the meaning of the 59 *Geo.* 3. and had actually become chargeable, he was removeable by the 35 *Geo.* 3. c. 101. There is abundant evidence of his chargeability; because he had applied to the parish officers for relief, and was relieved accordingly. There is no doubt, therefore, that he was removeable on the ground of his actual chargeability. Then secondly, did he in fact gain a settlement under the 59 *Geo.* 3.? Merely residing on a tenement of 10*l.*, unless he complied with the requisites of that statute, would gain him no settlement. The 59 *Geo.* 3. requires a bonâ fide taking of a tenement for one whole year, and the actual payment of a rent of 10*l.* for the whole year. Now, here, the pauper had not paid a year's rent until after the order of removal was executed; and though he subsequently paid it by the sale of his effects, yet that will make no difference, inasmuch as the statute has not a retrospective operation so as to confer a settlement after the party has actually become chargeable and has been removed. Then the third point is equally clear; because although the statute declares that the hiring of a tenement for the sum of 10*l.* a year for one whole year, and the actual payment of the rent, shall confer a settlement, yet the legislature did not mean to preclude the Sessions from going into the question whether the tenement so held was of the actual value of 10*l.* and of deciding against the settlement if it was found to be of less value. This, however, is a point not necessary to decide on the present occasion, it

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being sufficient to support the order of Sessions, that the rent agreed for was not actually paid at the time of the removal.

Nolan, contrà, insisted, first, that, assuming the pauper not to have acquired a settlement by renting the tenement in question, still he was irremoveable from the parish of *St. Botolph*, although he had actually become chargeable; second, that the pauper had acquired a settlement under the 59 *Geo.* 3. by renting a tenement, although he had not actually paid the rent until after he had become chargeable; and third, that the Sessions were precluded from going into the question of value, there having been a bonâ fide taking of the tenement at the actual rent of 10*l.* As to the first point; by the old settlement law, unless a person came into a parish in a state of vagrancy he was irremoveable; but in consequence of the inconveniences resulting from this in practice, the statute 13 and 14 *Car.* 2. c. 12. was passed, which rendered persons removeable within forty days who were likely to become chargeable, if they came to settle upon a tenement under the yearly value of 10*l.* So that by that statute if a person resided on a tenement of 10*l.*, whether chargeable or not chargeable, he was not removeable; and if he was not removed within the forty days, though he resided on a tenement under 10*l.* the same consequence would follow. Then followed the 35 *Geo.* 3. which recognizes the provisions of the preceding statute, by which it is expressly provided, that the party shall not be removeable though he has not gained a settlement, unless he has actually become chargeable. The cases of *Rex* v. *Leeds* (*a*) and *Rex* v. *Martley* (*b*) are authorities founded upon the principle now contended for, and shew that during the existence of a contract for a tenement of 10*l.* a year, a pauper is not removeable though chargeable. It is clear, therefore, that this pauper

(*a*) Burr. S. C. 524 S. C. 2 Bott. 468.

(*b*) 4 Burn, 531. See *Rex* v. *Fillongly*, 4 Burn, 495. *Rex* v. *Framlington*, Id. 471. and *Rex* v. *St. Paul, Deptford*, Id. 472.

was irremoveable though chargeable. The statutes 7 *Jac.* 1. c. 3. and 3 *W. & M.* c. 11. which prevented persons from gaining settlements unless they gave notice of their coming into the parish, do not affect the question as to the removeability, and therefore this question must be considered as it would have been under the 13 and 14 *Car.* 2. and 35 *Geo.* 3. But independently of this construction of the statute this pauper cannot be considered as in a state of actual chargeability; for at the time he applied for relief he had abundance of property to satisfy his rent and sustain himself and family; and consequently he was not removeable as a person actually chargeable, for it was the duty of the overseers to see that he was a person in want of relief. Then secondly, the pauper had in fact acquired a settlement independently of the question of his irremoveability. He had not only taken the house for a year, but he actually paid the rent within the meaning of the 59 *Geo.* 3. c. 50. It is true the rent was not paid until after he was removed; but still that will make no difference in the fair construction of the statute, the object of which was to prevent the fraudulent acquirement of settlements in a parish, by taking a tenement of a rent of 10*l.* per annum, which the party had not the means of paying. Now in this case although the pauper labored under temporary distress, still he had sufficient means of paying his rent, and in fact paid it. The landlord did not apply for his rent until the day after the relief was applied for, and then he gave the pauper fourteen days to pay it in. He paid it within the fourteen days by the sale of his effects, and therefore he was at least in the state of having an inchoate right of settlement at the time he became chargeable, which was afterwards perfected. Then thirdly, the Sessions had no right to go into the question of value. It is sufficient under this statute that there shall have been a bonâ fide taking of a tenement at the rent of 10*l.*; and therefore the Sessions were precluded from entering into the value, unless there was any reason to suppose that there was fraud in the contract. Here none was suggested, and no doubt was

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entertained that there was a bonâ fide hiring. The very object of the statute is to prevent the agitation of questions of value, and to save the enormous expense which had been so frequently incurred in cases of this nature before the legislature interfered. If, notwithstanding that statute, the Sessions are still to be at liberty to inquire into the value of a tenement, where there has been a bonâ fide taking, and an actual payment of 10*l.*, the act will become a dead letter, and the Sessions will be again harassed by an innumerable class of cases which it was the object of the legislature to set at rest. On these grounds the order of Sessions cannot be sustained.

Bayley, J.—I do not think it necessary to decide, (although I may entertain an opinion on the point,) that where the rent actually amounts to 10*l.*, but the Justices have found that the annual value is less than that sum, a settlement will or will not be gained; but as far as I can at present form a judgment, I would say, that the previous acts of parliament, which declare that the tenement shall be of the value of 10*l.*, are not affected, upon the question of value, by the 59 *Geo.* 3., and that the latter statute does not supersede the necessity which previously existed of proving the actual value. But independently of that point, I am of opinion that this pauper was removeable, notwithstanding the fact of his renting a tenement of 10*l.* at the time he became chargeable, and that he had not gained a settlement in the parish of *St. Botolph.* It is very material to attend to the date of the order of removal. Mr. *Nolan* says that the pauper was not chargeable, because he had property of his own which might have been applied to his own maintenance before he received relief from the parish; and that although the parish did in point of fact relieve him, yet he was not actually chargeable within the meaning of the 35 *Geo.* 3. c. 101. But it appears to me, that if the parish officers did not act fraudulently, and if they, by an order of Justices, are compelled to relieve the pauper, (and it does

not appear here that they knew he had any means of supporting himself,) and a charge is actually brought upon the parish for the purpose of maintaining him, we are bound to hold that he was actually chargeable within the meaning of that statute. Let us attend to the history of the law, with reference to the power of removing a pauper. It is contended, that although this pauper might not have gained a settlement, still he was not removeable. The statute 13 and 14 *Car.* 2. says that, if a person comes to settle upon a tenement of less than the value of 10*l.*, he shall be removeable within forty days, if he is likely to become chargeable; and it is now insisted, that after those forty days are expired, he would be irremoveable. But we are to see what alteration has been made in the law in that respect by the 35 *Geo.* 3. c. 101. That statute recites the 13 and 14 *Car.* 2., and takes away the power of removing persons who are likely to become chargeable, and declares that the parish officers must wait until the pauper is actually chargeable; but when he is actually chargeable, then, the legislature says, "in which case two Justices of the Peace are hereby impowered to remove the person or persons in the same manner, and subject to the same appeal, and with the same powers, as might have been done before the passing of this act with respect to persons likely to become chargeable." I take the meaning of these two statutes together to be this; that supposing, under the 13 and 14 *Car.* 2., a person could not be removed who was likely to become chargeable, unless the proper steps were taken for that purpose within forty days, the 35 *Geo.* 3. has taken away from the Justices the power of removing on the ground of being likely to become chargeable; but if at any period of the year the person becomes actually chargeable, then he is liable to be removed, as he might have been under the previous statute, whether the forty days had or had not expired. That being the case, a person who is become chargeable is, at all events, liable to be removed, unless he has obtained a settlement in the parish in which he happens to be. The 59 *Geo.* 3. c. 50.

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introduces a new legislative provision respecting the acquisition of a settlement by renting a tenement. Inasmuch as before that act, by a residence upon a tenement of the value of 10*l.*, a person acquired a settlement if he only resided for forty days, though he had only paid part of the rent, this statute introduces new regulations, and provides, among other things, "that no person shall gain a settlement in any parish or township by renting a tenement, unless such tenement shall consist of a house or building, being a separate and distinct dwelling-house or building, bonâ fide hired at and for the sum of 10*l.* a year at the least, for the term of one whole year; nor unless such house or building shall be held and occupied, and the rent for the same actually paid, for the term of one whole year at the least, by the person hiring the same." Now this pauper took a tenement at *Midsummer*, 1822, and resided in it for a year, and a year's rent became in arrear. At the conclusion of his year he might have made a tender of his rent upon the premises at sunset or the last hour of the day, and that would probably be considered as equivalent to an actual payment. There are many cases in which the law considers a tender as equivalent to payment, but the party must be always ready to make the payment when it is due. Here the rent was due at *Midsummer*, 1823. In *July* of that year and before he had actually paid any rent, he applies to the parish for relief, and actually becomes chargeable. Was he settled at that time? No; because, according to the words of the act of parliament, he had not then actually paid the rent for the term of one whole year, and consequently he had gained no settlement. On the 5th of *August* following he is actually removed by an order of Justices. There is an appeal against that order; what is the ground of the appeal? Because at that period he was not removeable. Had he acquired a settlement at that period? No, he had not; for no rent had been paid at that time. The payment of the rent afterwards does not make the previous order of removal by the Justices a bad order; he is removed to another place, not having

done any act to obtain a settlement in the place from whence he was removed. For these reasons it appears to me that the order of removal was good; that the Sessions did right in confirming it, and that their order ought to be confirmed.

Holroyd, J.—I am of the same opinion. In order to gain a settlement by renting a tenement, the 59 *Geo.* 3. c. 50. requires certain things to be done which were not requisite previously thereto. One of those things appears to me not to have been done by this pauper in order to gain a settlement in the parish where he was actually residing and renting a tenement at the time the order of removal was made, namely, the actual payment of a year's rent. It appears that the rent had not been paid at the end of the year, nor had any attempt been made to pay it. It is true that the landlord gave him a fortnight to pay it in, but there was no actual payment nor any thing done which can be considered in law as an actual payment. That being the case, no settlement appears to have been gained by the renting of the tenement. Without determining the objection as to the finding of the Sessions, that this tenement was under the value of 10*l.*, I think it is sufficient to give our opinion upon the foundation that the rent was not actually paid at the time the order of removal was made. Subsequent payment of rent does not by retrospect gain a settlement under 59 *Geo.* 3. after a pauper has actually become chargeable, and has been removed.

Littledale, J.—We need not decide whether the Sessions were at liberty to inquire into the actual value of the tenement, or whether they were bound by the actual contract to pay 10*l.* a year; for it appears to me that since the 59 *Geo.* 3. this person did not gain a settlement, inasmuch as the act directs that no settlement shall be gained until the rent is paid. Now the rent here was not paid until 14 days after the pauper was removeable. He was removed on the 5th of *August*, and at that time he had not

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gained a settlement. If he had not then gained a settlement, the subsequent payment of rent would not gain him one retrospectively. If he is once well removed, the subsequent payment of rent could not invalidate the order; and it appears to me that he was actually chargeable, though he had property enough to pay his rent. The parish officers were summoned to shew cause why they did not relieve him, and having in fact been compelled to pay him fourteen shillings, he was actually chargeable, and was capable of being removed under the 35 *G.* 3. c. 101.

Order of Sessions confirmed.

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Where a pauper contracted in writing for the purchase of two cottages and gardens at the price of 70*l.* and paid 10*l.* on account, at the date of the agreement, but never afterwards paid the remainder of the purchase money: Held, that he had not such an equitable estate as to render him irremoveable from the parish in which the property was situated.

JOHN PENNELL, his wife *Susan Pennell*, and their two children, were, by an order of two Justices, removed from the parish of *Woolpit* to the parish of *Combs*, both in the County of *Suffolk*. On appeal the Sessions quashed the order, subject to the opinion of this Court upon the following case:

In *July*, 1819, an estate was offered for public sale, in lots. One lot, consisting of a dwelling-house in two tenements, with gardens, situate in the parish of *Woolpit*, in the occupations of two persons of the names of *Drake* and *Browning*, was agreed to be purchased at the auction by *Thomas Pyman*, for the sum of 76*l.* The estate was sold subject to the following, among other conditions:—"Every purchaser shall immediately pay down a deposit, in the proportion of 10*l.* for every 100*l.* for his or her purchase money, to the vendor or his agent, and sign an agreement for the payment of the remainder to the vendor on the 11th day of *October*, 1819, at which time the purchases are to be completed, and the respective purchasers are then to have the actual possession of their respective lots, except of the cot-

tages, and such lots as are let off, of which the respective purchasers are then to be entitled to the receipt of the rents and profits, all outgoings to that time being cleared by the vendor. Upon payment of the remainder of the purchase money at the time above mentioned, the vendor shall convey the lots to the respective purchasers, each purchaser to prepare the conveyance to him or her. If any purchaser shall neglect or fail to comply with the above conditions, his or her deposit money shall be actually forfeited to the vendor, who shall be at full liberty to re-sell the lot or lots bought by him or her, either by public auction or private contract, and the deficiency, if any, occasioned by such second sale, together with all expenses, &c. shall be made good by the defaulters at this sale." *Pyman* paid the deposit of 7*l.* 12*s.*, and having signed a written agreement for completing the purchase, which was also signed by the auctioneer, as agent for the vendor, he was let into possession, and continued to receive the rents and profits until *July*, 1822. *Pyman* was ready to have paid, and called upon the vendor for the purpose of tendering him the remainder of the purchase money, but some difficulty having arisen as to the title, no conveyance was ever prepared by him. On the 24th *July*, 1822, *Pyman* contracted with the pauper to sell him the said premises for 70*l.*, and the following memorandum of agreement was drawn up and signed by them:—" Mr. *John Pennell* has this day paid Mr. *Thomas Pyman* the sum of 10*l.* in part of the purchase money for two cottages and gardens at *Woolpit*, in *Suffolk*. Mr. *Pennell* agrees to give Mr. *Pyman* 4*l.* for this year's rent of the cottages." No further sum was paid by the pauper, nor was any conveyance executed. On the 28th *July*, *Pennell* obtained leave of a tenant of one of the above cottages, to build a house in the corner of the garden. He began to build the house, but never completed it, and never lived on the premises; but in 1822 put into the house, which had neither doors nor windows, some barrels of beer, which he sold there during the fair at *Woolpit*. On

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the 2d *October*, 1822, the pauper, who had become embarrassed in his circumstances, was arrested, and went to prison. On the 21st of the same month he executed a deed of assignment of his personal estate to trustees, for the benefit of his creditors, with a covenant to execute a conveyance of all his real estate, whenever such deed should be tendered to him by his trustees. The deed also contained a covenant, that if there should be any surplus arising from the sale of his estates, real and personal, after the payment of his debts, it should be paid over to the pauper. A short time prior to the 23d *December*, 1822, the date of the order of removal, the trustees agreed to sell the same premises which the pauper had purchased of *Pyman*, to Mr. *Cobbold*, for the sum of 130*l*., who subsequently paid the purchase money, and was let into possession. Soon after the execution of the above-mentioned deed of assignment, the pauper, who, since his arrest, had at intervals been deranged, became a confirmed lunatic, and for some time prior to, and on the 23d *December*, 1822, had been, and was, kept in close custody in the parish, and at the time of the hearing of this appeal was confined in Bedlam. On the 24th *July*, 1822, when the pauper made the contract with *Pyman*, he resided with his family in lodgings at *Woolpit*, and continued there until he went to prison. His wife and family remained in *Woolpit* up to the time of the execution of the order of removal. The question for the opinion of the Court is, whether the pauper was irremoveable from the parish of *Woolpit* at the date of the order of removal.

Dover, in support of the order of Sessions. The pauper was irremoveable from the parish of *Woolpit*, on the general principle that no man in this country can, by the law of the land, be removed from his own. There are two propositions necessary to make out in the present case; first, that the pauper had such an equitable estate that a court of equity would decree a conveyance, and that consequently he

would be irremoveable; and second, that, assuming him to have an interest of that description, it was not devested by the act of his trustees in the subsequent sale to Mr. *Cobbold*. It is not contended that the pauper gained a settlement in *Woolpit* by the means stated in the case, but merely that he was irremoveable. The first question is; had he an equitable estate in this parish by means of the agreement for the sale of the cottages and gardens, entered into between him and the vendor? According to the rules of equity he clearly had. In *Com. Dig. tit. Chancery*, [4. I. 1.] it is said, "that if there are articles for a purchase, the vendor stands seised in trust for the purchaser before a conveyance executed." *Ca. Ch.* 39. 2 *P. Wms.* 629. *Payne* v. *Mellor*(a), *Seton* v. *Slade*(b), *Green* v. *Smith* (c), and *Broome* v. *Monck* (d), are authorities for the maxim, that equity looks upon things agreed to be done, as actually performed. The agreement for sale, therefore, between the vendor and the pauper, must, upon this principle, be considered as a thing actually done, although the conveyance had not been executed. It is clear that if the pauper had paid, or offered to pay, the remainder of the purchase money, he would have been entitled to go into equity to have a conveyance decreed. The agreement operated as a conveyance of a positive interest, and gave him such a possessory right as would, at least, render him irremoveable. This is a much stronger case than *Rex* v. *Edington* (e), and *Rex* v. *Horsley* (f), in which last case it was held, that a sole next of kin entitled to take out administration to the intestate, had such an equitable interest in a leasehold tenement of the latter, as to confer a settlement and render her irremoveable. The case of *Rex* v. *Stone* (g), and *Rex* v. *Staplegrove* (h), are also strong authorities to the same effect. All that is necessary to shew here is, that the pauper was not removeable within the spirit

(a) 6 Ves. 349.
(b) 7 *Id.* 265.
(c) 1 Atk. 572.
(d) 10 Ves. 597.
(e) 1 East, 288.
(f) 8 *Id.* 405.
(g) 6 T. R. 295.
(h) 2 B. & A. 527.

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of the statute 13 & 14 *Car.* 2. as a vagrant intruder into a parish in which he had nothing of his own. If he had any interest whatever, legal or equitable, he would be irremoveable upon the spirit of that statute, although the interest would not be sufficient to confer a settlement. This case is distinguishable from *Rex* v. *Geddington* (*a*), and *Rex* v. *Long Bennington*, T. T. 57 *G.* 3. (*b*), because in each of those cases the struggle was not to shew that the paupers were irremoveable, but that they had gained a settlement by reason of the estates then under consideration; and in both, default had been made by the vendees by the non-performance of their respective contracts. Here the only object is to shew that the pauper was irremoveable, and here no default has been made, the agreement never having been vacated. This case is also distinguishable from *Rex* v. *Horndon-on-the-Hill* (*c*), and *Rex* v. *Hagworthingham* (*d*), which were cases of doubtful equity, and where the paupers had merely a personal license, under which no interest passed which was capable of assignment. Then, secondly, assuming that the pauper had such an equitable interest in this parish as to render him irremoveable, the question is, whether his interest was devested by the act of his trustees in the subsequent sale to Mr. *Cobbold*. It is clear, that at the date of the order of removal, the pauper himself had done nothing to part with his interest. He had never executed any conveyance of this estate, nor had any ever been tendered to him for execution. It stands, therefore, that whatever interest he had in the estate, still remains in him. The trust deed which he executed, contained a covenant that he should execute such a conveyance, when tendered to him, and although that covenant might be enforced in a Court of Equity, still his interest remains unimpeached. The Court below having determined that the pauper was irremoveable, this Court will make every intendment to support that conclusion.

(*a*) Ante, vol. iii. 403.

(*b*) Not reported, sed vide Mr. Justice *Bayley*'s statement of the case in *Rex* v. *Geddington*, ante, vol. iii. 405.

(*c*) 4 M. & S. 562.

(*d*) Ante, vol. iii. 16.

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Storks and *H. Cooper*, contrà, were stopped by the Court.

Bayley, J.—I am of opinion that the order of Sessions must be quashed. After the decision of *Rex* v. *Geddington*, which was founded upon *Rex* v. *Long Bennington*, it is quite idle to contend that the mere payment of a deposit upon the purchase of an estate of this description, is sufficient to confer such an equitable estate, as will confer a settlement or render the party irremoveable. Those cases have decided that an equitable right is not sufficient to confer a settlement, or make the pauper irremoveable. There must be an equitable estate actually vested to produce these consequences. It is impossible to say that this pauper ever had an equitable estate. He had an equitable right; that is to say, he had a right upon the payment of the remainder of the purchase money, to go into a Court of Equity and call upon the vendor for a conveyance. He had an inchoate equitable right, but clearly had not an equitable estate. It never could be predicated of him, that he had a right to go into a Court of Equity, and demand a conveyance of the estate at all events, and say that he was seised in his demesne as of fee, in Equity.

Holroyd, J.—I am also of opinion, that so far from the pauper having an equitable estate, he had not even a right to go into a Court of Equity until he had tendered or signified his consent to pay the remainder of the purchase money; and if it was refused on the other side, and he had filed a bill in equity, notwithstanding the refusal, the bill, I should presume, would be dismissed with costs. He had no right to go into equity, unless he had done or offered to do all that was necessary on his part to perfect his title.

Littledale, J.—I am of the same opinion. He had no right to go into equity, unless he did something else, which he had not done.

Order of Sessions quashed (*a*).

(*a*) Vide *Rex* v. *Northweald Bassett*, ante, 276.

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The King *v.* The Inhabitants of St. Nicholas, Leicester.

A bastard child, born in an extra-parochial place, does not acquire its mother's settlement.

BY an order of two Justices, *Caroline Littlewood* was removed from the parish of *All Saints*, in *Derby*, to the parish of *St. Nicholas* in *Leicester*. On appeal, the Sessions confirmed the order, subject to the opinion of this Court on the following case:—

The pauper is the illegitimate child of *Elizabeth Littlewood*, now deceased, and was born in the month of *May*, 1822, in an extra-parochial place, called the *Black Friars*, in *Leicester*, which is not a vill, and for which no overseers have ever been appointed. She was shortly afterwards taken by her mother to the parish of *All Saints, Derby*, where she remained until the death of her mother, and up to the time of making the order of removal in question. *Elizabeth Littlewood*, the mother, had, six years previously to the birth of the daughter, gained a settlement in the parish of *St. Nicholas*, and was legally settled in that parish at the time of the birth of the child, and of her own death.

N. R. Clarke (with whom was *Goulburn*), in support of the Sessions. The question for the decision of the Court is, whether a bastard, born in an extra-parochial place, where it can acquire no settlement by birth, is removeable to the place of settlement of the mother. That question must be decided in the affirmative. The child of a *British* born subject must ex necessitate have a settlement somewhere. If it be an illegitimate child, and cannot acquire a birth settlement, its settlement must follow that of the mother, to which it is removeable. This principle is not new. So early as 2 *Bulstrode*, 358. it was resolved that if a child be born a bastard in the House of Correction, to which the mother has been sent, its settlement shall follow that of the mother, and it shall not be settled in the parish where the prison is situate. When that case was decided,

there was no act of parliament respecting the settlement of bastard children; but since then various statutes have passed providing for the case of a birth pending an order of removal *(a)*; for bastards born in lying-in hospitals *(b)*; in a house of industry in an incorporated district *(c)*; under a certificate from a benefit society *(d)*; in gaol *(e)*; and where a pregnant woman has been fraudulently removed from one parish to another *(f)*. In the case of *Whitechapel* v. *Stepney (g)* it is laid down that the place of the birth of a bastard child is the place of its settlement; "for it gains a settlement in such place ex necessitate." But if the birth place be extra-parochial, and consequently it can have no settlement in such place, it follows of necessity that it acquires a settlement by parentage, for otherwise it cannot be provided for at all, but must perish. [*Bayley*, J. Every person is entitled to be provided for in the parish where he happens to be, unless the parish officers can find some other place to which he may be sent.] But suppose the case of an illegitimate child residing in an extra-parochial place, there is no mode by which such a child can obtain relief but by committing an act of vagrancy and wandering into some parish in order to obtain that support which the law considers him entitled to receive. A bastard child, born in the transit of the mother from one parish to the other, is held to be settled in the mother's parish *(h)*. [*Bayley*, J. Certainly. Suppose the mother to be resident in the parish of *A.* being settled in the parish of *B.* and in the removal from *A.* to *B.* the child is born in *C.* there is no doubt that the child would be settled in *B.* because the law considers the question of settlement as if the mother had arrived at the latter parish at the time of the birth. It would be hard that the parishioners of *C.* should suffer from the accidental circumstance of the child being dropt in

(a) 35 *G.* 3. c. 101. s. 6.

(b) 13 *G.* 3. c. 82. & 54 *G.* 3. c. 170.

(c) 20 *G.* 3. c. 30. & 54 *G.* 3. c. 170.

(d) 33 *G.* 3. c. 54.

(e) 54 *G.* 3. c. 170.

(f) See 2 Bott. 2. pl. 4. & pl. 8.

(g) 2 Bott. 1.

(h) 2 Bott. 4. pl. 10.

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transitu in their parish.] Then comes the question whether the child in this instance must not be relieved by its mother's parish. It can gain no settlement in the place of its birth, and if it does not acquire the settlement of its mother, it will acquire no settlement any where, and will be entitled to no relief. The provisions of the statute 49 G. 3. c. 68. s. 2. afford a strong argument to shew that the child must follow the settlement of its mother. By that statute it is enacted, "that if any single woman shall declare herself to be with child, and that such child is likely to be born a bastard, and to be chargeable to any parish, township, or *extra-parochial place*, and shall in an examination to be taken in writing, upon oath, before any justice, &c. charge any person with having gotten her with child, it shall be lawful for such justice, upon application made to him by the overseer of the poor of such parish or township, or by any *substantial householder in such extra-parochial place*," to issue out his warrant for the apprehension of such person, &c. Now, at first sight, it might seem from this statute, that the burthen of maintaining a bastard child, born in an extra-parochial place, would fall upon the inhabitants of such place, and that a remedy would be given against the putative father. But neither of these consequences follows. No power whatever is given to proceed against the putative father in the case of a bastard born in an extra-parochial place; the law not having provided for such a case. It is clear that where a township or extra-parochial place does not maintain its own poor, there is no person to whom the maintenance money, which the putative father would be liable to pay, could be paid. But if the Court should hold that the child is settled in the mother's parish, there would be no difficulty in apprehending the putative father, and making him give security for the maintenance of the child. If, on the contrary, it should hold that the settlement does not follow that of the mother, then the putative father is perfectly secure, and the child will have no settlement

whatever, nor be entitled to any relief without committing an act of vagrancy (*a*).

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Nolan, contrà. It is a mistake to suppose that the statute 49 *Geo.* 3. c. 68. is confined in its operation to places where there are overseers to put the law in force against the putative fathers of bastard children. Undoubtedly, in places where there are overseers, they are the only persons who can make the complaint; but it is equally clear, that in extra-parochial places, where there are no overseers, any substantial inhabitant may apply to the justice and obtain a warrant to apprehend the father, and compel him to give security for the maintenance of the child. The argument on the other side, that because a bastard is not settled in the place where it happens to be born, it therefore takes the mother's settlement, cannot be supported. The law recognizes primâ facie no settlement of a bastard child, except the place of its birth, and no case has yet occurred in which it has been attempted to make a bastard follow the settlement of the mother, except it has been so provided by particular acts of parliament, as in the instances put on the other side, which are cases expressly excepted from the general rule. It appears to be perfectly clear, from the provisions of the 49 *Geo.* 3. c. 68., that the legislature did not intend the maintenance of bastards, born in an extra-parochial place, to be provided for by the parish in which the mother might be settled. Had such been the intention, no doubt the statute would have contained some provision to that effect; instead of which, it seems to enact the contrary, by giving a remedy against the father to the inhabitants of the extra-parochial place. It is a fallacy to say that the pauper must belong somewhere, and must be removeable to some place, or else perish, unless she be removed to the mother's settlement. It by no means follows that every person in *England* must have a place of settlement to which he is removeable. Hundreds of persons in

(*a*) See *Rex* v. *Oakmere*, ante, vol. i. 427.

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this country are relieved as casual poor, who have no settlement whatever, and upon this principle, that if a bastard pauper have no settlement, he must be relieved as casual poor. In *Rex* v. *Saighton-on-the-Hill* (*a*) a pauper, having gained a settlement in a township which afterwards ceased to maintain its own poor, was removed to his previous settlement, and the removal was held bad. On that occasion, *Abbott*, C. J. said, "There may be many cases where a pauper having no settlement in the place where he may happen to be, may still not be removeable from it, either because he has no settlement at all, or because the parish officers are not enabled to discover the place of his settlement." This is one of those cases in which the pauper is irremoveable. It does not come within the meaning of any of the statutes, either authorizing the removal of paupers, or establishing the various modes by which settlements may be gained, and therefore without some enactment expressly upon the subject, a bastard child cannot be removed to any place, except that of its birth, and where that place happens to be extra-parochial, it is then entirely irremoveable, and must be maintained as casual poor, by the parish in which it happens to reside. On these grounds the order of Sessions must be quashed.

F. Clinton, on the same side, was stopt by the Court.

Bayley, J.—The argument urged in support of the order of Sessions, is founded on the supposition that every person in this country must have some settlement to which he may be removed. That, however, is not so. If those circumstances, which the law says shall confer a settlement apply to the case propounded, then the party is settled; but if they do not apply, then he is not settled. Foreigners, for instance, coming to this country have no settlement whatever; and bastard children born in an extra-parochial place have no settlement. The instances pressed

(*a*) 2 B. & A. 162.

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upon our consideration by Mr. *Clarke*, in support of his argument, are exceptions from the general rule, and are founded either upon some express legislative provision, or some known rule of law, respecting the settlement of bastard children born under certain circumstances. If the mother of a bastard child is laid under constraint, and removed to a place against her will, and is there delivered, the law says that the child shall not be considered as settled in that place; because the mother was not there in the character of a free agent. The legislature presumes in such case, that if she had been left to herself she would have remained in that parish in which she was settled, and consequently that the burthen ought to fall in the place in which it would have fallen in the ordinary course of events but for her removal. This is the principle also which governs in the case of a woman pregnant of a child likely to be born a bastard, and who in the transit to her place of settlement is delivered in a third parish, in which case the child is settled, not in the place where it is actually born, but in the place to which the mother belongs, the settlement being suspended until the mother arrives at her destination. None of these cases apply to the case in question. It being, however, my opinion, that in many instances a settlement is no benefit, but a great burthen, to the party, I think there ought not to be a forced separation between the child and the mother. The child is to be with the mother for nurture until it arrives at that period of life when it is capable of contributing to its own maintenance; and though the child is born in an extra-parochial place, yet the mother may carry it to the place where she resides, and retain it for nurture until it is of a sufficient age to leave the parent. In this case I think the illegitimate child is not entitled to a settlement in *St. Nicholas* parish, and therefore the order of Sessions must be quashed.

Holroyd, J.—I am of opinion that the child did not

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gain the mother's settlement by reason of its being born in the extra-parochial place in question. In general an illegitimate child gains a settlement in the parish in which it is born, and not in that of the mother, because it does not gain the settlement of the parents, as in the case of legitimate children. There are, however, excepted cases expressly provided for by act of parliament. One is, where the child is born in a place to which the mother is removed by process of law, in which case the child is considered as settled in the parish to which the mother belongs; and another is, where, pending an order of removal, the mother is delivered in a third parish, in which case, in the eye of the law, the mother is considered as being virtually in the parish to which she belongs, and the child as settled by birth, though not in the parish where it is born. But for the case now under consideration there is no legislative provision; and therefore we are bound to hold that this child does not acquire the settlement of its mother, though born in an extra-parochial place.

Littledale, J.—The general rule of law is, that a bastard child is to be considered as settled in the parish where born. Here is a child born in an extra-parochial place, and therefore does not acquire any settlement. It is for the wisdom of the legislature to pass a law, declaring that in such cases the child shall gain the settlement of the mother; but I do not see why, because this child has gained no effectual settlement, we are to disturb a general principle of law, in order to say that it must be settled in the mother's parish. In most cases people have settlements, but there may be many where no settlement can be acquired. I know of no general rule of law which says, that every native of this country must be settled somewhere, and removeable to some place. This case, at least, is one exception from the general rule, if such exists. There are many cases where the bastard child acquires the mother's settlement, though not born in her parish; but these are cases

provided for by various acts of parliament. There are others where, from the necessity of the case, the child acquires the mother's settlement; as where the bastard is born before an order of removal of the mother to her parish can be executed; in which case the child is settled, not where it is born, but in the parish to which the mother belongs. The mother is considered, in contemplation of law, as having arrived at the place to which the order of removal had sent her. This is the principle of 17 *Geo.* 2. c. 5. s. 25. (*a*) In such cases the child of necessity acquires the mother's settlement; but I can see no reason arising from necessity, and certainly there is no act of parliament, authorising us to hold that the pauper acquired the settlement of its mother.

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Order of Sessions quashed.

(*a*) Vide 2 Bott. p. 8. pl. 19.

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An order of Sessions upon an appeal between two parishes respecting the settlement of pauper A. is not admissible upon the trial of an appeal touching the settlement of pauper B. his sister, on a suggestion that the point at issue was precisely the same in both appeals.

TWO Justices, by their order, removed *Elizabeth Burdett*, single woman, from the parish of *Gumley* to the parish of *Knaptoft*, both in the county of *Leicester*. Upon the trial of an appeal from this order the respondents, in support of the order, proved that the father of the pauper, while residing in the respondents' parish, had received relief from the appellant parish for five years prior to 1815. The appellants then offered in evidence an order of the court of Quarter Sessions upon an appeal, in 1815, between the same parishes respecting the settlement of a brother of the pauper, by which an order, adjudging the brother to be settled in the appellant parish, was quashed. This was objected to by the Counsel for the respondents, and rejected by the Court. Another order was then produced, whereby the pauper, *Elizabeth Burdett*, was removed from *Gumley* to *Mowsley* in 1822, which was afterwards quashed by consent. The

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appellants then called the chairman of the court in 1815, who proved that his notes of the trial were destroyed, and that he did not remember the evidence. They then called the father of the pauper, and asked him whether he was a witness at the trial in 1815. To this he answered in the affirmative. He was then asked to what facts he was then examined. This was objected to by the counsel for the respondents. The Court thought that the question was not relevant, and not admissible: and they confirmed the order of removal, subject to the opinion of this court on the evidence so tendered by the appellants.

S. M. Phillips, and *Humfrey*, in support of the order of Sessions. The judgment of the Sessions in the former appeal was not admissible in evidence on the hearing of the present appeal, and therefore the Justices have done right in rejecting it. The rule upon this subject was ably laid down by *De Grey*, C. J. in his celebrated judgment in the Duchess of *Kingston's* case (*a*), and has been invariably adopted and acted upon by all subsequent judges. He says "From the variety of cases relative to judgments being given in evidence in civil suits, it seems to follow as generally true, that the judgment of a Court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive, between the same parties, upon the same matter, directly in question in another Court:" and the same principle and the same rule appear, with still greater force, to apply to judgments in the *same* Court (*b*). The evidence rejected in this case does not come within the scope of that rule, for it was not "directly upon the point," nor "between the same parties," nor "upon the matter directly in question." The same point was not in issue in the two appeals, for the former was to try the question of where the brother of the pauper was settled, and the latter was to try where the pauper herself was settled. If it had been received it would have been wholly irrelevant and ineffective, for it could have proved

(*a*) 20 Ho. St. Tr. 538. (*b*) Vide Phil. Ev. 242, 3d ed.

nothing bearing upon this case, although it might, and probably would have been, conclusive, if the parties to this appeal had been the same as were concerned in the former. To hold such evidence admissible under such circumstances, would be productive of great inconvenience and injustice, for it would be, in effect, compelling one parish to try the question of their own rights and liabilities according to the judgment, or the ability, or the whim of another.

Clarke and *G. Marriott*, contrà. What would have been the effect of the evidence, if admitted, is not now the question. The parties to the two appeals are virtually the same, and the question at issue would also have appeared to be the same, if the evidence had been received. [*Bayley*, J. The question of the admissibility of the judgment may stand upon a very different footing, according as the effect of it was to quash or confirm the order of removal. Where the order is quashed, the removing parish may have failed from want of evidence, and may be better furnished upon another appeal.] The object proposed in tendering the judgment in evidence was to shew, that the point then in issue was precisely the same as that in issue in the former appeal; that the appeal had in fact been once already tried and disposed of, and that the appellants had acted against good faith in seeking to try it again. Then, secondly, the question put to the pauper's father, and not allowed by the Sessions to be answered, was a perfectly legal question, and was also calculated to shew the identity of the two issues, and therefore ought to have been allowed. *Strutt* v. *Bovingdon* (*a*) and *Vooght* v. *Winch* (*b*).

The Court took two days time to consider the case, and judgment was now delivered by

BAYLEY, J. (*c*)—Two questions were raised for our

(*a*) 5 Esp. N. P. C. 56.

(*b*) 2 B. & A. 662. See 3 Wils. 304, 2 Sir W. Bl. 830, 3 Burr. 1353, and 8 T. R. 620.

(*c*) *Littledale*, J. was absent.

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consideration in this case. First, whether the prior order of removal, and the judgment of the Court of Quarter Sessions quashing the same, were admissible in evidence in the present appeal; and second, whether the question put to the pauper's father and interdicted by the Court, ought to have been allowed and answered. The order of removal and the judgment thereon, were tendered for the purpose of disproving the pauper's settlement in the respondent parish: the question put to the pauper's father, he having stated that he was examined at the former appeal, was, what facts he had there stated. We, who heard this case argued, are decidedly of opinion that the prior order of removal and judgment were not, with any explanation, receivable in evidence on the second appeal. The prior order of removal was quashed. That may have been done upon any one of three grounds. Either, because the Sessions were of opinion that the pauper was emancipated and had acquired a settlement of his own; or, because the respondents were not then in a situation to prove the father's settlement in the appellant parish; or, because the appellants were able to prove a settlement of his elsewhere. The case does not inform us on which of these grounds the order was quashed, but it is conceded that it was quashed upon the merits, and not upon any point of form. If we believed that the ground of the judgment was the want of proof of the father's settlement in the appellant parish, and had then thought that the evidence was, under those circumstances, admissible, we should have sent the case back to the Sessions for further explanation on that head; but we are of opinion, that under none of the circumstances supposed, the evidence was admissible, and therefore we think it better to dispose of the case in its present shape. As a broad and general proposition, we may say, that the order of removal, confirmed, or reversed upon appeal, or acquiesced in without appeal, is receivable in evidence, because it is a judgment of law. But where, and under what circumstances, is it receivable? This inquiry is answered by the rule laid down by *De Grey*, C. J. in the

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Duchess of *Kingston's* case, by which we find that, to make the order receivable, the parties in the case must be the same, and the point in issue must be the same: these are both indispensible qualifications. If the matter in issue be collateral or incidental, the evidence cannot be received. The language of that learned judge, as applicable to the present case, is, "that a judgment directly upon the point, is, as evidence, conclusive between the same parties, upon the matter directly in question." Does this case fall within that rule? Is the matter in question in the second appeal the same as that in the former? Is the judgment offered in evidence in the second directly upon the point which was in issue in the former? We think not. From the very nature and substance of the order of removal, it is merely collateral to the issue raised in the second appeal. By the original order an individual, not the pauper in this case, was removed; the question to be tried on appeal was, where his settlement was; the judgment decided that his settlement was in a particular parish. That was the point there, and that was the matter in question; but it is not so here. The early case of *Harrow* v. *Ryslip* (*a*) will illustrate this position. The case was this.—"*A.* comes into *Harrow*, and being likely to become chargeable, was removed to *Ryslip; Ryslip* appealed, and upon the appeal *A.* was adjudged to be settled at *Ryslip;* afterwards *Ryslip* discovered that *Hendon* was the place of his last legal settlement, and sent him thither; and the question was, whether, after the adjudication upon the appeal, *Ryslip* was not estopped against all the world, to say, that *Ryslip* was not the place of his last legal settlement: et per *Holt*, C. J., "*Ryslip* is estopped to say otherwise: for if *Ryslip* had not been the very place of his last legal settlement, the Justices must have sent him back to *Harrow*, who were first possessed of him, for that reason, because they were possessed of him, and he did not belong to *Ryslip*. And now this is in effect the same question again, viz.—whether he belongs to *Ryslip?* which question has been

(*a*) Salk. 524. Vide *Mynton* v. *Stony-Stratford*. Id. 527.

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already determined by the Justices on the appeal, who have adjudged that he was last settled at *Ryslip*." The report goes on to say,—" Afterwards this was moved again, and then *Holt* and *Gould* held the adjudication was final as to *Ryslip* against all persons and places, because the point of his settlement as to *Ryslip* was tried in the appeal; but as to *Harrow* (for he had been formerly removed by them to *Hendon*, and that order reversed) they were at liberty to send him to any other place, and were not estopped; because the Justices on the appeal did not adjudge him to be settled at *Harrow*, though they adjudged him now to be settled at *Ryslip;* so that the other point was not tried." The language of the Court in one part of this case applies to the instance where the order of removal is confirmed, and that on the other where it is reversed, and points out the distinction already alluded to between a judgment of confirmation and one of reversal. In the latter instance the Sessions do not find where the pauper is settled, and thus, the order of removal, confirmed, or unappealed from, is conclusive evidence that the settlement is in the place to which he is removed; reversed, it is conclusive evidence that the settlement is not there; and beyond this point, no case with which we are acquainted has ever yet gone. There are, undoubtedly, cases which shew that where the point in issue is decided, all results flowing out of that point are decided also; as, for instance, that a wife's removal to the place of her husband's settlement, is conclusive to shew that that is his place of settlement. But no case has ever gone further than to hold that the point decided is conclusive upon the same point, and therefore receivable in evidence; other points, collateral or incidental to the point decided, and undetermined by it, are excluded from its operation, and cannot be proved by giving the point decided in evidence. It is the same with respect to judgments; they are merely evidence of the point decided. It is admitted that the pauper has no settlement in the parish to which he has been removed, unless his father has acquired a settlement there.

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Then the father's settlement was a question which came in incidentally, but incidentally only, and was not the point decided by the judgment in the first appeal, which consequently was not admissible as evidence in the second. For these reasons, we are of opinion that the order of Sessions in this case was right, that the Sessions properly rejected the evidence tendered, and that the rule for quashing their order must be discharged.

Order of Sessions confirmed.

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Where, in the absence of the usual proof in support of a settlement by apprenticeship, it appeared that the pauper, when a boy, had lived for three years with his master, and then ran away; that twenty years since a fire had happened in the apartment in which the pauper's father lived, and destroyed every thing he had; that the father and mother of the pauper were both dead; that the pauper's master, and the wife of the latter, were also dead; that the master had left no property at his decease, and that no relatives of his were to be found; that a fellow-apprentice of the pauper had seen in his master's hand an indenture, which he understood to be the indenture of apprenticeship of the pauper; and that after the pauper had left his master's service he married, and the parish in which he was supposed to have served as an apprentice, relieved his wife by receiving her into the workhouse: Held, that this was sufficient evidence to warrant the Sessions in presuming a legal binding and service as an apprentice, so as to confer a settlement.

BY an order of two Justices, *John Pearce*, *Elizabeth* his wife, and their two children, were directed to be removed from the parish of *St. Paul, in Norwich*, to the parish of *St. Mary-le-bone*, in the County of *Middlesex*; but *John Pearce* being then sick, the execution of the order was suspended, and he having soon afterwards died, the order was executed as to his widow and children, and they were accordingly conveyed to their destination. On appeal the Sessions confirmed the order, and stated the following case for the opinion of this Court:

The said *John Pearce*, deceased, the pauper, when a boy, lived with one *Benson*, a shoemaker, in *Ridinghouse-Lane*, in the parish of *St. Mary-le-bone*, in the County of *Middlesex*, three years, and then ran away from him. The respondents, in order to prove that the pauper so resided, as an apprentice legally bound, and at the same time to account for the non-production of indentures of apprentice-

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ship, proved that a fire happened about twenty years ago in the apartment in which the pauper then resided, and burnt every thing he had; that the father and mother of the pauper were dead; that the said *Benson* and his wife are also dead; that the said *Benson* left no property at his decease; and that no relatives of his are to be found. As to the service with *Benson* by the pauper, it was stated by one *Thomas Nash* that he was apprentice to *Benson* at the same time with the pauper and another apprentice, and that he saw in his master's hand an indenture, which he understood to be the indenture of apprenticeship of the pauper; that the pauper, as well as the witness and the other apprentice boarded and lodged in the master's house, in *St. Mary-le-bone*. Another witness stated, that he knew *Benson* at the time the pauper lived with him; that *Benson* had then two other apprentices, and called his apprentices lazy rascals. It further appeared that the pauper afterwards married, and that while living in the parish of *St. Mary-le-bone* his wife was admitted into the workhouse of the said parish of *St. Mary-le-bone*, in a state of illness, and there died. If the Court should be of opinion that the above was sufficient evidence to prove a binding by indenture, and a service of the pauper as an apprentice, to *Benson*, in the appellant parish, then the orders of removal and of the Sessions to be confirmed; otherwise, to be discharged.

H. Cooper, in support of the order of Sessions. The evidence was sufficient in every respect to establish a settlement by apprenticeship in *St. Mary-le-bone*. First, there was evidence enough of the existence and subsequent destruction of the indenture to let in the parol testimony; and second, the parol testimony, when admitted, was sufficient to shew that the husband of the pauper had been a party to the indenture, and had served, and gained a settlement, under it. The facts found in the case warrant these conclusions; for it is found that all the parties to the indenture are dead, and that they left behind them no relations, or property, from

which any information upon the subject could be obtained. Search, therefore, was absolutely useless, for no hope could be entertained either that the indenture itself, or any will of *Benson*, the master, or any person who had acted either as his executor or administrator, would be discovered. It will be said that search should have been made at the Stamp-office, to ascertain whether any such indenture had been registered as having been stamped there. But, in the first place, evidence of that search, and of the result of it, would have been in the nature of hearsay evidence, and therefore open to objection; and secondly, even if admitted, it would not have gone the length of proving that any such indenture had really ever been executed. Such a search might, indeed, have been impracticable; for the commissioners might not have granted liberty to make it, and there is no law which compels them so to do. Such evidence would stand on a very different footing from that of the enrolment of a deed under the statute of Uses, which latter is of itself a record, and therefore free from all objection. Neither was such a search necessary, because in *Rex* v. *Long Buckby* (*a*), where an indenture, executed thirty years before, in the county of *Northampton*, was proved to have been delivered to the apprentice at the expiration of his time, and lost, and the parish in which he was settled by service under it, had relieved and otherwise treated him as a parishioner for the last twelve years previous to the appeal; the Court was of opinion, that the Sessions, under these circumstances, were right in presuming that the indenture had been regularly enrolled and stamped, although the other side proved, by the deputy-register and comptroller of the apprentice duties, that it did not appear that any such indenture had been stamped with the premium-stamp from 1773 to 1805. The presumption of law is to be favored, and against this negative evidence by the comptroller, may be set the possibility of an irregularity in the return made to the office(*b*). Then, secondly, the parol

(*a*) 7 East, 45.

(*b*) 1 Nol. P. L. 544.

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evidence, when admitted, was sufficient to justify the Sessions in the determination which they formed. How, or for what reason, could the witness, *Thomas Nash*, "understand what he saw to be an indenture of apprenticeship," unless it was so stated and represented to him at the time? In *Rex* v. *St. Michael's, Bath*(*a*), upon a question of settlement of the wife and children of a militiaman, it appeared by his examination, taken in writing under the Mutiny Act, that he went apprentice to *J. M.* and served five years and an half. The pauper, who was his wife, proved her marriage four years ago; that he ran away from her nine months afterwards; and that she had neither seen, heard from, nor known what was become of him, since. *J. M.*, the supposed master, being dead, this was held a reasonable presumption of a binding, although some circumstantial evidence was produced by the other side to shew that *J. M.* never had an apprentice; "for every thing is to be presumed in favor of a settlement." (*b*) It is true that the authority of this case seems questioned in *Rex* v. *Clayton-le-Moors* (*c*), but it has never been shaken in that part with reference to which it is now used, namely, the doctrine of presumption in favor of a settlement. On these grounds it is submitted that the Sessions have properly disposed of this case, and that their order ought to be affirmed.

Robinson, contrà, contended that the parol testimony was inadmissible upon every rule and principle of the law of evidence. It was mere hearsay, and amounted to nothing like the positive testimony of facts. There was nothing proved which went to shew any intention on the part either of the supposed master or apprentice to execute an indenture, or to form any such relative connection, and none of the formalities requisite to the due execution of such an instrument were shewn to have been observed. All that was proved in fact amounted to this, that the witness, *Nash*, had on one occasion seen a paper which he understood to be an

(*a*) 2 Bott. 459. (*b*) 1 Nol. P. L. 542. (*c*) 5 T. R. 704.

indenture. That was not evidence for any purpose, and ought not to have been admitted as such.

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Bayley, J.—I am of opinion that the parol testimony admitted in this case was properly received, and that it was sufficient to found the presumption that an indenture was executed, and that the pauper's husband served, and acquired a settlement, under it. The general rule applicable to the doctrine of presumption is, that we are to presume that which reasonably accounts for the actual existing state of things, and I think the presumption drawn by the Sessions satisfies that rule. The facts in this case, unrefuted, appear to me conclusive. The pauper's husband lived with his master in the character of an apprentice, doing the same work, and receiving the same treatment, as his other apprentices did; and surely, after an interval of twenty years, it is not too much to presume that he really was an apprentice. With respect to proof of the destruction of the indenture, I think enough was given to let in the secondary evidence, and that the search at the Stamp-office was quite unnecessary. It must not be forgotten that the fact of the first wife of the pauper having been received into the workhouse of *St. Mary-le-bone* shews that that parish believed her husband to have been their parishioner, and that fact, coupled with the others I have alluded to, is, I think, decisive to shew that he had acquired a settlement as an apprentice in that parish.

Holroyd, J. concurred (*a*).

Order of Sessions affirmed.

(*a*) *Littledale*, J. was at the Old Bailey.



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A notice of appeal against overseers accounts, stating that the appellant "will object to the following items, or charge of payments, in the said accounts, that is to say," and then setting out the items objected to, without specifying the particular causes or grounds of appeal, pursuant to 41 *G.* 3. c. 23. s. 4. is insufficient.

Where the attornies on both sides signed an admission the day before the Sessions, respecting items in the overseers accounts, objected to by the appellant: Held, that it was not a waiver of due notice of appeal, not having been signified by the respondents or their attorney "in open Court," as required by s. 5. of the same statute.

THIS was an appeal against the accounts of the Overseers of the Township of *Soothill*, in the West Riding of the County of *York*, from *April*, 1822, to *April*, 1823. At the hearing of the appeal at the last *Epiphany* Sessions for the West Riding of the County of *York*, the counsel for the respondents objected to the sufficiency of the notice given by the appellants. The Sessions, however, overruled the objection, and proceeded to hear the merits of the said appeal; and struck out certain items in the said accounts, subject to the opinion of this Court upon the following case:—

The appellant is a rated inhabitant of the township of *Soothill*, and having at the *October* Sessions, 1823, entered an appeal against the accounts of the respondents, on the 2d *January*, 1824, served the following notice upon the respondents:—"Gentlemen, as the solicitor of Mr. *John Twigg*, of the township of *Soothill*, in the West Riding of the county of *York*, a rated inhabitant of the said township, I do hereby give you notice, that at the last General Quarter Sessions of the peace, held by adjournment at *Leeds*, in and for the said Riding, the said *John Twigg* entered an appeal against the accounts of *Joseph Sheard* and *Thomas Tong*, overseers of the poor of the said township of *Soothill*, during the following periods, that is to say, from the month of *April*, 1822, to the month of *April*, 1823, sworn to by them before and allowed by two of His Majesty's Justices of the Peace of and for the said Riding, on the 1st day of *October* last, and that at the same Sessions the Court respited and adjourned the hearing of the said appeal to the then and now next General Quarter Sessions of the Peace, to be held by adjournment at *Wakefield*, in and for the said Riding; and I do hereby give you further notice, that the said appeal will be heard and argued at the said last-mentioned Sessions,

and that upon the hearing thereof, the said appellant will object to the following items:—

RENTS.

1822.	£.	s.	d.
Grace Rhodes, half year	0	16	0
Edward Senior	1	0	0
William Goodhall	1	0	0
Sarah Akeroyd, 1 year, due 1st *May*, 1822	1	14	6
Judith Kilburne, ½ year	1	6	8
Sure Hargreaves	1	17	6
Betty Redfearn	1	0	0
William Pindar	1	0	0
Robert Whittaker	2	0	0
Rebecca Kilburne	0	18	0
George Milner	1	10	0
Mary Fothergill	1	0	0
Hannah Watson	1	9	10
Sarah Clough and Rich. Seekar	1	10	0
John Newsome	1	7	6
John Wilkinson	0	15	6
George Redlesding	0	15	0
William Blakely	1	0	0
Mary Carr	1	10	0
Hannah Senior	0	10	6
Sarah Hall	1	3	0
	£25	3	7

		£.	s.	d.
May 3.	Making out the rate	0	7	6
June 29.	Expenses at William Derwent's, *Dewsbury*	2	5	6
	Attending the above	0	3	6
July 8.	Expenses at William Derwent's	3	4	0
	Attending at do.	0	3	6
Aug. 7.	Mr. Wooller, ½ year's salary	6	6	0
Sept. 20.	James Greaves's account	5	11	2
	Richard Oldroyd's do.	3	10	9½
	Making rate for churchwardens	0	7	6
	J. S. Archer's account	11	15	8
	David Sheard's do.	3	14	11
	Mrs. Hopkinson's do.	10	10	0
	Henry Hemmingway's do.	23	8	2
	Expenses at signing accounts	4	0	0

And I do hereby give you further notice, that the said *John Twigg* will insist upon the hearing of the said appeal, that all the said items or charges ought to be struck out of the said accounts, and disallowed; and I do hereby give you notice to produce, upon the hearing of the said appeal, the said accounts so sworn to and allowed as aforesaid, and all and every the bills, accounts and vouchers, for or regarding the said several sums of money above enumerated and objected to; and also the several rates or assessments, made for the relief of the poor of the said township of *Soothill*, during the year 1822 and 1823. Dated the 2d day of *January*, 1824.

Charles Carr,
Solicitor for the said *John Twigg*, the Appellant.

To the said Messrs. *Joseph Sheard* and *Thomas Tong*, and also to the Churchwardens and Overseers of the Poor of the said Township of *Soothill*."

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The counsel for the respondents objected to the hearing of the appeal, on the ground that the particular causes and grounds of appeal against the items contained in the said notice, were not specified and stated in the said notice, as directed and required by the statute 41 *Geo.* 3. c. 23. s. 4.

On the 14th *January*, 1824, the day before the appeal came on to be heard, the attorney for the respondents and the attorney for the appellant entered into the following admissions.

"We do hereby agree to admit, on the hearing of this appeal, that all the payments charged in the accounts of the said respondents, to which the appellant objects, were actually made to or for the use of the several persons to whom the same are charged to be paid, and that the several sums charged in such accounts to have been paid to *J. S. Archer*, *David Sheard*, Mrs. *Hopkinson*, and *Henry Hemmingway*, respectively, were for debts contracted by the overseers of the poor of the said township of *Soothill*, in one or more years previous to the year in which the said respondents were overseers, and were not contracted by the said respondents for the service of their current year; and the respondents undertake to produce, upon the hearing of the appeal, the original accounts and vouchers regarding the items and sums of money objected to by the appellant."

The Court of Quarter Sessions, without expressing any opinion as to the goodness of the notice, considered the admissions as a complete waiver of the objection to the said notice, entered into the merits of the said appeal, and disallowed the four items mentioned in the above admission.

Blackburne, in support of the order of Sessions, contended, first, that the notice of appeal pointed out with sufficient certainty the appellant's objections to the items therein enumerated, in compliance with the statute 41 *Geo.* 3. c. 23. s. 4; and second, that supposing the notice to be insufficient, still the respondents had waived the insufficiency,

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by entering into the admissions stated in the case. The statute 41 *Geo.* 3. c. 23. s. 4. requires that the particular causes or grounds of appeal shall be stated and specified in the notice; and by section 5. it is provided, that with the consent of the overseers, signified by them or their attorney, in open Court, the Sessions may proceed to hear and decide upon the appeal, although no notice thereof shall have been given. Now, in either view of this case, the Sessions have done right in hearing the merits of this appeal. First, with respect to the notice, all that the legislature requires is, that such information shall be given to the respondents as will enable them to come prepared to meet the objections stated by the appellant. The statute does not require any particular form of notice, but merely such a notice as will apprise the overseers of the general nature of the objections to their accounts. Reading the whole of the notice set out in this case, the respondents were fully informed of the particular grounds of appeal against their accounts. The whole of the items objected to are set forth: and upon the very face of those items, they are clearly illegal charges for which the township was not liable. For example, the charge of 4*l.* for the expenses incurred at the signing of the overseers' accounts, is clearly objectionable in point of law, and required no specification of the grounds of objection. From the manner in which the accounts were made out, it was impossible for the appellant to give a more specific notice of appeal than was given in this case. But, secondly, the admissions signed by the attornies on both sides are a complete waiver of all objection to the notice. Those admissions specify distinctly what were the objections which the appellants had to four of the items, upon which alone the Court below decided. Those were items which were clearly disallowable in the overseers' account. The respondents knew very well what the appellant's objections were to these items, and the signing of the admissions was an acknowledgment that they had sufficient notice. On these grounds the order of Sessions must be affirmed.

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E. Alderson, and *J. B. Greenwood*, contrà, contended, first, that the mere enumeration of the items mentioned in the notice as being objected to, was not sufficient without specifying the particular causes or grounds of appeal as required by the statute; and second, that the admissions which had been signed, were no waiver of the notice, inasmuch as they had not been signified by the respondents or their attornies, "in open Court." Upon the first point they cited *Rex* v. *Mayull* (a), *Rex* v. *The Justices of Oxfordshire* (b); and upon the second, they relied upon the words of the 5th section of the statute, and cited *Rex* v. *Horne* (c), and *Hussey* v. *Wilson* (d).

The Court took time to consider of the case, and judgment was now delivered by

Bayley, J.—This was an appeal against overseers' accounts, and the Court of Quarter Sessions allowed the appeal, as to four particular items, subject to a case reserved for the consideration of this Court; and the question was whether there had been such a notice of appeal as the statute 41 *Geo.* 3. c. 23. requires, or if not, whether there had been an effectual waiver of such notice. That statute requires either a notice in writing, or a consent by the overseers, to be signified by them or their attorney in open Court, in order that the Sessions may proceed to hear the appeal, notwithstanding there has been no proper notice given. The statute directs that the notice shall be in writing, and shall be signed by the person giving it, or by his attorney, and that it shall be left at the place of abode of the persons against whose accounts the appeal is made, and the particular causes or grounds of appeal shall be stated and specified in such notice; and then there is a provision that the Sessions shall not examine or inquire into any other cause or ground of appeal than the notice specifies. Now, in this case, the

(a) Ante, vol. iii. 383.
(b) Ante, vol. i. 281.
(c) 4 T.R. 349.
(d) 5 T. R. 254.

notice which was served before the Sessions, stated that the appellant would object to 35 items or charges of payment, which are specified. The attorney who signs the notice says, "Take notice that the said appeal will be heard and argued at the said last mentioned Sessions, and that upon the hearing thereof, the said appellant will object to the following items or charges of payment in the said accounts, that is to say;" and then he enumerates thirty-five different items. When this case came on before the Sessions it appeared that the day before the adjournment day, the attornies on each side met and agreed to admit that all the payments objected to were in fact made, but that four of those were for debts contracted by the overseers in one or more years previous to the year in which the respondents were overseers, and were not contracted by them for the service of the current year, and the respondents undertook to produce, upon the hearing of the appeal, the original accounts and vouchers regarding the items and sums of money objected to by the appellant. The Sessions expressed no opinion as to the validity of the notice, but they thought that these admissions were a waiver of all objection to the notice; and therefore the questions for the consideration of this Court are, first, whether this was a waiver, and if not, second, whether the notice was a good and valid notice. The fifth section of that statute, in direct terms, declares, in cases where there is not any notice, "That with the consent of the overseers signified by them or their attorney *in open Court*, and with the consent of any other person interested therein, the said Court of Sessions may proceed to hear and decide upon such appeal, although no notice thereof shall have been given in writing, and also that, with the like consent, such Court may hear and decide upon grounds of appeal not stated or mistated in such written notice, where any notice shall have been given in writing." Now as the legislature has pointed out a specific form of waiver, we think we are not at liberty to say that any other form will be sufficient. The statute provides, that the waiver shall be,

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with the consent of the overseers signified by them or their attorney, "in open Court." When the legislature points out one specific mode, we have not the power of saying that any other mode will be equivalent, so as to supersede the necessity of that which the legislature requires. Here there was no signification "in open Court," either by the respondents or their attorney, that the Sessions should be at liberty to proceed upon the appeal, notwithstanding the defective notice, provided the notice was defective; and therefore we are of opinion, that, inasmuch as there was not such a consent in open Court as the statute provides, we are not at liberty to say that any other waiver would let the appellant into evidence of the notice, provided we should think that the notice was not sufficient. Now as to the notice itself, is it possible to say that it specifies the causes and grounds of appeal, in pursuance of the directions of the statute? It states that the appellant objects to these thirty-five items or charges of payment. Why? It is perfectly silent why. It may be on the ground that none of the payments were ever made, and that every one of them is a false charge. Under the supposition that that might be the ground of objection the respondents would probably come prepared to prove the fact of payment; but when they came to Sessions they might find that they had burthened themselves uselessly with such proof, for then they might be told that such was not the point in dispute. Another objection might be, that they ought not to have paid these sums of money. Then they might come prepared, not only to prove that they had in fact been paid, but that they were payments which they were required and bound to make. Again, the objection might be, that though paid, and rightly paid, yet they ought not to be brought to charge against the parish, but ought to be personal obligations on the overseers themselves, and that the attempt to bring them in charge against the parish was unconscionable. Other grounds of objection might be anticipated, which are not necessary to mention. The act of parliament having required that the appellant

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shall specify the grounds and causes upon which he objects to the overseers' accounts, it seems to us, that a notice of appeal in which the party contents himself with saying that he shall object to thirty-five items or charges of payment, but does not condescend to state upon what grounds he will object to them, is a defective notice, and consequently that the Order of Sessions in this case, allowing the appeal as to four out of the thirty-five items, ought to be quashed.

Order of Sessions quashed accordingly.

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Where a pauper hired himself and served for a year, in the parish of A., and just before the expiration of that year he hired himself again for a second year, and after serving six months under that hiring, he went with his master into the parish of B., and there served out the remainder of his second year, sleeping there the last forty nights: Held, that he did not acquire a settlement by hiring and service in the latter parish under the statute 3 & 4 W. & M. c. 11.

TWO Justices, by their order, removed *Henry Scotney* and *Rebecca* his wife, from the parish of *Apethorpe*, to the parish of *Sudborough*, both in the county of *Northampton*. The Sessions, on appeal, quashed the order, subject to the opinion of this Court, upon the following case:

The pauper, *Henry Scotney*, being settled in *Apethorpe*, was hired, about six years ago, by a Mr. *Gilby*, of *Brigstock*, for a year, to commence at old *Michaelmas*, the whole of which service he performed in *Brigstock*, sleeping also in that parish. Before the expiration of the year, Mr. *Gilby* again hired the pauper from the following old *Michaelmas* to the new *Michaelmas* succeeding. There was no interruption of service, and under the second hiring the pauper served his master about half a year in *Brigstock*, and then removed with him to *Sudborough*, in which latter parish he finished his service under such second hiring, and slept the last forty nights in *Sudborough*. The question for the opinion of the Court is, whether the pauper acquired a settlement by hiring and service in the parish of *Sudborough*.

Holbech and *Adams*, in support of the order of Sessions. The pauper did not acquire a settlement by hiring and

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service in the parish of *Sudborough*. The 3 & 4 *W.* & *M.* c. 11. s. 7. provides, that if any unmarried person, not having child or children, shall be lawfully *hired into* any parish or town *for one year, such service* shall be adjudged and deemed a good settlement *therein*. In order therefore to confer a settlement, there must be a hiring for a year into the parish, and some service in the parish under that hiring; and where a pauper has served a whole year under a yearly hiring in one parish, and then removes, without making any new agreement, into another parish, a year's service there will not confer a settlement, because there is no hiring into that parish within the meaning of the statute. *Rex* v. *Croscombe* (*a*) appears at first sight opposed to this argument, but that case will on examination be found distinguishable from the present, because there the Court decided that there was a settlement in the second parish, upon the ground that they might presume a new hiring into that parish (*b*). *Rex* v. *St. Giles, Reading*, (*c*) shews that the Court, in *Rex* v. *Croscombe*, acted upon the presumption either of a continuance of the old contract, or the formation of a new one, and that where there is no such presumption, and no express hiring, no settlement can be gained. *Rex* v. *Fillongley* (*d*) decided that a service under a hiring for fifty-one weeks may be coupled with a service under a previous hiring for a year, so as to confer a settlement; but there both the services were performed in the same parish, and therefore there was, in the language of *Bayley*, J., "a hiring for a year, and a service for a year, sufficient to confer a settlement." Forty days residence will not confer a settlement, unless they come within the scope of the year for which the party is hired; *Rex* v. *Denham* (*e*); which in this case they do not; for, as the Court there said, "it would be neither reasonable, nor expedient, that an inquiry should be gone into over a long period of time, at detached

(*a*) Burr. S. C. 256; 2 Str. 1240. S. C.

(*b*) 1 Nol. P. L. 426.

(*c*) Cald. 54. S. C. 2 Bott. 435.

(*d*) 1 B. & A. 319.

(*e*) 1 M. & S. 222.

intervals, to ascertain a settlement." [*Bayley*, J. Is not *Rex* v. *Alton* (*a*) directly in point, and is it not decisive against the settlement here?] It certainly is, and therefore whether considered with reference to the words of the statute, or the decided cases, it is plain that there was no hiring into the parish of *Sudborough*, and consequently no settlement gained there.

G. Marriott and *Humfrey*, contrà. According to the view taken of the statute by *Lee*, C. J., in *Rex* v. *Croscombe* (*b*), the pauper has gained a settlement in *Sudborough*, because he served there under a continuing yearly hiring, and slept the last forty nights there. It was said by that learned Judge, that he could not distinguish the case then under consideration " from the cases cited, of a hiring for a year and a service for a year; which is holden to gain a settlement, though the service be *not under the same hiring*; and he thought it quite indifferent in what PARISH the service was, since it was the same SERVICE." So in *Rex* v. *Ashton* (*c*), a servant maid was hired for a year in the parish of *Ashton*, where she served half a year; then her master, and she with him, removed to the parish of *Patshall*, where he took another farm, and where she continued with him for the other half year. The Court said, a settlement was gained in *Patshall*, because, " Here is what the act requires, a hiring for a year and a service for a year. For it is the same service; and the statute doth not tie it down to one place. If a person is hired to a master in one parish, and goes with him into another parish, and serves him for one whole year, the parish he continues in last for forty days before the end of his year, is the place of his settlement: and the reason why the forty days gain a settlement is, because he comes there with his master, and you cannot remove him from his master, and having con-

(*a*) Cald. 424; 2 Bott. 382.
(*b*) Burr. S. C. 256.
(*c*) 2 Const. 273. See *Rex* v. *Brighthelmstone*, 5 T. R. 188.

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tinued with him forty days unremoveable, he gains a settlement." It seems impossible to distinguish these cases from the present, therefore the pauper gained a settlement in *Sudborough*.

Bayley, J.—I think this case was properly disposed of at the Sessions. If we were to hold that service in a second parish, without any yearly hiring, or under a yearly hiring into a former parish, would confer a settlement, the result would be, that a servant who lived twenty years in twenty different parishes with the same master under one original hiring, or even under different weekly hirings, so that he was originally hired for a year, would be settled in that parish in which he happened to reside the last forty days; which would be equally subversive of the statutes, and of all the decided cases on the subject. *Rex* v. *Croscombe* has no bearing upon the present case, because the ground of decision there was, that the Court construed the second contract as a new yearly hiring, and connected the services in both parishes; whereas here there is no second contract, and no new yearly hiring. The same view of that case was taken by *Willes*, J., in *Rex* v. *St. Giles's, Reading*, where he says, "secondly, because the Court did there presume the continuance of the old contract. If the original hiring were constructively to be continued throughout the second year, it might last for twenty years; and parishes, on such a construction as is contended for in support of these orders, might be burthened, by retrospect, with families from whose labour they had received no benefit." This case, therefore, rests entirely upon the statute of 3 & 4 *W.* & *M.* c. 11. and the only question is, whether this pauper was "hired into" the parish of *Sudborough* "for one year," within the letter or spirit of the act. I am clearly of opinion that he was not, and therefore that he has not acquired a settlement there. The statute 8 & 9 *W.* & *M.* c. 30. does not assist this case, because, though it was passed to explain the former statute with respect to

the nature of the service required, its effect is rather to narrow than to extend the power of obtaining settlements. The order of Sessions must be confirmed.

Holroyd, J.—It is quite clear that this pauper acquired no settlement in the parish of *Sudborough*. The effect of *Rex* v. *Croscombe* was, either that the original hiring was by the agreement of the parties continued into the second parish, or that, by construction of law, there was an implied yearly hiring into the second parish; and any thing that was suggested by the Court beyond that, was extra-judicial, and must not be considered as binding upon us in a different case. The construction of the statute referred to, as given by *Lee*, C. J., in *Rex* v. *Croscombe*, is not consistent with the other authorities, and cannot be supported upon sound principles of law. The 13 & 14 *C.* 2. c. 12. empowered the Justices to remove any person to the place where he was last legally settled as a servant for the space of forty days; the 1 *J.* 2. c. 17. provided that the forty days continuance should not make a settlement, but from the time of delivering notice in writing: and the 3 & 4 *W.* & *M.* c. 30. s. 6. enacted, that if any unmarried person, not having child or children, shall be lawfully hired into any parish or town for one year, such service shall be adjudged and deemed a good settlement therein, though no such notice in writing be delivered. It is perfectly plain, that such service must mean service under a yearly hiring into the parish where it is performed; but as doubts were entertained upon the subject, the 8 & 9 *W.* & *M.* c. 30. removed all ambiguity, by declaring that no person hired into any parish or town for one year, shall be adjudged or deemed to have a good settlement in any such parish or township, unless such person shall continue and abide in the same service during the space of one whole year. The result therefore is, that, in order to confer a settlement in any parish by hiring and service, there must be a yearly hiring into, and some service under that

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hiring, in that parish. Here there is no yearly hiring, expressed or implied, into the parish of *Sudborough*, and consequently no settlement is conferred(a).

Order of Sessions confirmed.

(a) *Littledale*, J. was at the Old Bailey.

The KING v. The BREWERS' COMPANY.

Where a person, claiming as heir at law of the tenant last seised of a copyhold, was refused admission by the lord, and a mandamus issued, but the lord in his return thereto did not deny the heirship, except argumentatively, the Court ordered a peremptory mandamus to go.

THIS was a return to a mandamus which issued in *Hilary* Term last, directed to the defendants, lords of the manor of *Williotts*, in the parish of *South Mims*, in the county of *Middlesex*, and to the steward and deputy steward of the said manor, commanding them to admit *Robert Fossick* to a copyhold tenement, consisting of a messuage or inn, called the *White Hart*, two cottages, and several parcels of land, holden of the manor, as tenant thereof, and to accept the surrender by the said *R. F.* of the said tenement, &c. to the use of *Martha Winter*, to secure to her the sum of 1000*l.* and interest, according to the custom of the manor. The writ stated that in or about the year 1778, *Hannah Lofty* the younger was admitted tenant to the premises in question; that she afterwards surrendered them to the use of her will; that by her will, dated 4th *February*, 1779, she devised them to her mother, *Hannah Lofty* the elder, for her life, after her death to *Edward Fage* and *Mehitabel* his wife, for their lives, and after their deaths, to their child or children, their heirs and assigns, for ever; that the testatrix then devised all the residue of her estates whatsoever and wheresoever to her said mother, her heirs and assigns, for ever; that the testatrix died seised of the premises on the 2d *March*, 1779; that her mother was admitted tenant for her life, and, being seised, by her will, dated 3d *May*, 1786, devised them to her niece *Mehitabel Fage*, her heirs and assigns, for ever; that *Edward Fage*

and *Mehitabel* his wife were admitted tenants; that *Mehitabel Fage* survived her husband and all their children, and, on the 17th *February*, 1821, died seised of the premises, without issue, and without making any will; that *Robert Fossick* is the brother and heir at law of *Mehitabel Fage*, and also heir at law of *Hannah Lofty* the elder; that at a Court Baron held on 10th *November* last, and on several subsequent occasions, *Robert Fossick* applied to be admitted to the premises, and to be allowed to surrender the same to the use of *Martha Winter*, to secure to her the sum of 1000*l.* and interest, which she had advanced him on the security thereof; but that the defendants have absolutely refused and neglected, and still do refuse and neglect to admit him and to accept his surrender. The return stated, that at a Court Baron held 8th *July*, 1778, *Hannah Lofty* the younger was admitted tenant to the premises, as only sister and heir at law of *Ezekiel Lofty*, deceased, to hold to her, her heirs and assigns, for ever, and at the same Court surrendered them to the use of her will; that at a Court Baron, held 24th *July*, 1780, it was presented that she had died seised of the premises since the last Court, and that by her will, dated 4th *February*, 1779, she devised the premises to her mother, *Hannah Lofty*, for her life, after her death to *Edward Fage* and *Mehitabel* his wife, for their joint lives and the life of the survivor, and after their deaths to their child or children living at the death of the survivor of them, their, his, or her heirs and assigns, for ever; that at the same Court the said *Hannah Lofty* the mother was admitted tenant to the premises, to hold to her for her life; that at a Court Baron, held 26th *June*, 1787, the death of the said *Hannah Lofty* the mother was presented; and that at the same Court the said *Edward Fage* and *Mehitabel* his wife were admitted tenants to the premises, to hold unto them and the survivor of them, during their joint lives and the life of the longest liver of them; that at a Court Baron, held 10th *November*, 1823, it was presented that *Mehitabel Fage* the

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wife, and afterwards the widow of *Edward Fage*, died since the then last Court, but whether she left any child or children, her surviving, was unknown; that at three several general Courts Baron held 10th *November*, 1823, and 3d and 27th *April* last, three several proclamations had been made for the child or children of the said *Mehitabel Fage* by the said *Edward Fage*, her late husband, to come into Court and be admitted to the premises under and according to the will of the said *Hannah Lofty* the younger; but no one came, and such default had been recorded; that under the residuary clause in the will of the said *Hannah Lofty* the younger, whereby she devised all the residue of her estates, of what nature or kind soever or wheresoever, unto her said mother, *Hannah Lofty*, her heirs, executors, administrators and assigns, for ever, the reversion in fee in the premises descended upon the customary heir of the said *Hannah Lofty* the elder; that at the said Court Baron, held 27th *April*, the first proclamation was made for the heir at law, or customary heir of the said *Hannah Lofty* the elder, to come into Court and be admitted to the premises, or in default thereof, the same would be seised into the hands of the lords of the manor for want of a tenant; that at the same Court, *Daniel Fossick* came and claimed, as he had before done, when the proclamations were made for the child or children of *Mehitabel Fage*, on behalf of his father, *Robert Fossick*, as customary tenant of *Hannah Lofty* the elder, and likewise as heir at law of *Mehitabel Fage*, and produced certain cases relative to the construction of the will of *Hannah Lofty* the younger, with counsel's opinion taken thereon, and also certificates verified by the affirmation of the said *Daniel Fossick*. The certificates were then set out, stating, that *Mehitabel Fossick*, daughter of *Robert Fossick* and *Mehitabel* his wife, was born the 1st day of the 12th month, 1755; and, that *Robert Fossick*, son of *Robert Fossick* and *Mehitabel* his wife, was born on the 12th day of the 7th month, 1765. The return proceeded to state, that at the

same Court came *Elizabeth Sine*, late *Elizabeth Fossick*, spinster, by *Henry Schultes*, her attorney, and claimed to be admitted to the premises, first, as only surviving sister and heiress at law, according to the custom of the manor, of *Mehitabel Fage*, who was the last tenant; second, as one of the nieces and co-heiresses of *Hannah Lofty* the elder; third, as only surviving legal representative of *Robert Fossick* and *Mehitabel* his wife; and in support of the claims of the said *Elizabeth Sine*, the said *Henry Schultes* stated, that the register of the birth of *Robert Fossick*, on 12th *July*, 1765, had been fraudulently inserted in the register book from whence the certificate was taken, and was destitute of the formalities requisite to authenticate it; he also stated the said *Robert Fossick* to be illegitimate; that at the same Court came *Mary Moreton*, and claimed to be admitted to the premises, alleging that *Robert Fossick* was illegitimate, but not questioning the legality of the claim made on behalf of *Elizabeth Sine*; that after considering the claims of the different parties, the said Court Baron were of opinion that *Elizabeth Sine* had shewn a colorable title to the premises, and ought to be admitted thereto, and she was accordingly admitted, and paid for a fine 160*l*. and her fealty was respited. To this return *Robert Fossick* demurred.

R. Bayley, in support of the demurrer, was stopt by

The Court's intimating, that the fact of the defendants having admitted another party, could not operate so as to conclude the present claimant.

Chitty, contrà. *Robert Fossick* claims as heir, and therefore he must establish his title in that character in a Court of Equity; he cannot come to this Court for a mandamus to the lord to admit him. [*Bayley*, J. The return does not deny the fact that he is the heir, which it ought to do; it is essential to the validity of a return, that it should be cer-

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tain, which this is not.] *Rex* v. *Rennett* (*a*) is an authority for saying that a copyholder, who claims by descent, cannot proceed in the course adopted in this case; this Court will not interfere by mandamus to assist an heir at law; his proper remedy is in Chancery. [*Bayley*, J. It is stated in the writ, that the heir at law wishes to be admitted for the purpose of raising money upon the estate; is not that a legitimate subject for our interposition on his behalf?] Certainly not, because he cannot legally raise money upon the estate, until he has been put in possession by regular course of law (*b*). [*Holroyd*, J. The case of *Rex* v. *Rennett* is very distinguishable from this; the only reason why the Court there refused to interfere was, that their interference was not necessary to the interests of the heir.] Nor is it here, and therefore the same reason will dictate the same course of proceeding. [*Bayley*, J. Suppose the heir wishes to devise the estate; his will would not be operative for that purpose until he has been admitted, and therefore our interference may be necessary to his interests.] Claiming as heir, his will, devising the estate, would be operative, even before his admission and surrender to the use of his will; though it certainly would not if he claimed as devisee. *Doe* v. *Danvers* (*c*), *Rex* v. *Hendon* (*d*).

Bayley, J.—The Court have in this, as in other cases, a discretionary power, to grant or withhold a mandamus, according as the justice of the case and the interests of the parties seem in its judgment to require. If, as seems to be the drift of the present argument, the present claimant obtained the writ upon a representation that he was entitled as devisee, and has framed it, and now demands admission, as heir, the defendants might have defeated that scheme by moving to quash the writ. It is, as I have already suggested, a settled rule, that a return to a mandamus must be certain and explicit in its language, and above all, that it

(*a*) 2 T. R. 197.
(*b*) *Watkins* on Copyholds.
(*c*) 7 East, 299.
(*d*) 2 T. R. 484.

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must not be argumentative; *Rex* v. *Lyme Regis*(a). Upon that ground, I am decidedly of opinion, that this return is bad; it does not deny that *Robert Fossick* is the heir at law; it does not assert that he is illegitimate; it only reasons upon the subject, which is a fatal defect. The act of admitting this person tenant, will not confer upon him any title as against the lord, because he has admitted one person already, and therefore has done all that he can to weaken his own title, if it could be weakened by such means. Upon the short ground, therefore, that this return is bad for argumentativeness and uncertainty, I am of opinion that it must be quashed, and that a peremptory mandamus must issue.

Holroyd, J.—This return is clearly insufficient, and must be quashed. Whether the Court will, or will not, in a case like the present, grant a mandamus where the title of the claimant is not clearly made out, is not now a question growing out of this case, and does not require any opinion or the declaration of any general rule from us. A sufficient ground has already been shewn to induce the Court to grant the first writ, and therefore the defendants, having been heard on that occasion, cannot now object to the course then adopted (b); all that it was open to them to do, was either to comply with the first writ, or to give a good legal answer to it; and as they have done neither, a peremptory mandamus must go (c).

Rule absolute for a peremptory mandamus (d).

(a) Doug. 182. (b) 5 T. R. 66.

(c) *Littledale*, J. was at the Old Bailey.

(d) Vide Cro. Jac. 368. 2 Rol. 274. 6 East, 431. 2 M. & S. 87. Com. Dig. G. 2. 5. 7. 10. 1 Rol. 505. 1 Leo. 100. 3 Id. 221. 4 Id. 31. 4 Rep. 22. Id. 26 b.

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A custom "that all the tenants, resiants, and inhabitants of a manor, shall grind at the lord's mill all *their* corn and grain, as well growing within the manor as brought from other places, and spent ground in their houses," may be a good custom, but it shall not extend to restrain the inhabitants who do not grow corn and grain, or who have no corn and grain of their own, from using ground corn or flour, though it may not have been ground or grown within the manor.

THIS was an action on the case brought in pursuance of the directions of his Honor the Vice-Chancellor, to try whether the defendant had been guilty of a breach of a custom for all the tenants, resiants, and inhabitants of the manor and township of *Selby*, in *Yorkshire*, to grind at the lord's mill, all the corn and grain spent ground, within the manor or township. The declaration contained several counts, of which the following only were material. The third count stated that plaintiffs were lawfully possessed of a mill, &c. within the manor of, &c., and by reason thereof were entitled to have the toll of all the corn and grain ground there; that all the tenants, resiants, inhabitants, and dwellers of and within the manor, during the term of plaintiffs' possession of the mill, ought to have ground, and still of right ought to grind, at the mill, all their corn, &c. which after the grinding thereof had been, or should be, expended or consumed in a ground state in their respective messuages or dwelling-houses within the manor, and to have paid to plaintiffs for the grinding thereof certain ancient and customary toll; yet defendant, contriving to deprive plaintiffs of the profit of their mill and of the toll which would have accrued to them, and to enable and procure the tenants, &c. to withdraw their grist from the mill, wrongfully ground or caused to be ground, at other mills, a large quantity of corn, for the purpose of exposing to sale and selling the same, in a ground state, within the manor, to the other tenants, &c. to be by them expended, &c. in their respective messuages, &c. within the manor, and did expose to sale, and sell by himself, and one *S. W.* his agent in that behalf, the last mentioned corn so ground and being in a ground state, within the manor, to divers persons, resiants, &c. to be expended, &c. in their respective messuages, &c. within the manor, and which corn, &c. was by the said persons used and expended in their respective messuages, &c.

whereby the said tenants, &c. did supply themselves with corn, &c. in a ground state, to be expended, &c. in their dwelling houses, which but for such exposing to sale and selling ground by defendant, they would have ground, or have purchased when ground, at plaintiffs' mill. Fourth count, that defendant wrongfully procured certain corn, &c. which had been before ground at other mills, and which he knew to have been ground at other mills, to be exposed to sale in a ground state, in a certain dwelling-house of one *S. W.*, within the manor, to divers resiants, &c. and afterwards sold the same to such resiants, &c. Fifth count, that defendant wrongfully procured a certain quantity of corn, &c. which had been before ground at other mills, and which he knew, &c. to be exposed to sale, partly in a ground state, and partly manufactured into bread, in, &c. and that the same was sold there accordingly; omitting to state that it was consumed by resiants within the manor. Sixth count, that one *S. W.* was a resiant, &c. within the manor; yet that defendant, well knowing the premises, wrongfully procured the said *S. W.* to withdraw her grist from plaintiffs' mill, and to grind at another mill a quantity of corn, &c. to be by her, after the grinding thereof, used, &c. and which was used, &c. by her in her dwelling-house within the manor. Last count, that defendant procured *S. W.* to grind corn at another mill for the purpose of sale, and which was sold by her in a ground state, within the manor, to resiants, &c. to be used by them in their dwelling-houses within the manor, and which was by them so used, &c. Plea, the general issue, and issue thereon. At the trial before *Bayley*, J. at the *Yorkshire Lent* Assizes, 1820, the plaintiffs had a verdict, damages one shilling, subject to the opinion of the Court upon the following case:—

The plaintiffs, at the time of committing the alleged grievances, were in possession of the mill, hereinafter described, as the lessees of the lord of the manor of *Selby*. Before the alterations hereinafter mentioned, there were two ancient water corn mills, belonging to the lord of the manor,

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and situate within the manor. Between fifty and sixty years ago, these were pulled down, and one water corn mill erected in their stead, upon their scite, having a wind corn mill above it. About the year 1806, the streams of water by which the water corn mill had been worked were diverted from that mill, under the authority of the act of parliament and in the manner hereinafter mentioned, and that mill has been ever since, and still is, worked by steam instead of water. From time immemorial there had been an ancient custom within the manor of *Selby*, and which was established by two decrees of the Court of Exchequer; the first in 3 *Car.* 1., and the last in 4 *Geo.* 2., "that all and singular the tenants, resiants, inhabitants and dwellers, of and within the town and manor of *Selby*, used and were accustomed, and of right ought, to grind all their corn and grain, as well growing within the said manor, as brought from other places, and spent ground in their houses within the said manor and town, at the said ancient mills of the said lord, called *Selby* Mills, paying a certain toll or mulcture for the same, according, &c.;" and this custom still continues to exist within the manor, and to be applicable to the present mill, unless the alteration of the mill as before described, or any other circumstances stated in this case, shall be deemed to have extinguished, destroyed, or suspended the said custom. Copies of the above mentioned decrees accompany this case, and may be considered as forming part thereof. By an act of 45 *Geo.* 3., entitled, "An act for draining and improving certain low grounds and carrs within the parishes, townships, and places of *Selby*, &c. in the *West Riding* of the county of *York*," a power is given to a commissioner therein named either to agree with the proprietors of and persons interested in any mills, weirs, dams, lands, tenements, and hereditaments, which the commissioner should judge necessary or expedient to be made use of for the purposes of the act, or which might be liable to be damaged in the execution thereof, for the purchase of such mills, &c. or for the recompense to be made to such proprietors, &c. for the damage they might sustain, or for

any eventual injury that might arise to their property by the execution of any of the powers contained in the act. Under this act the commissioner agreed with the Dowager Lady *Petre*, as guardian to her son, the Honorable *Edward Robert Petre*, then a minor, and lord of the manor of *Selby* and owner of the said mill, on the following terms; viz.—" *Selby, April* 22, 1806. I, *William Shipton*, of *Green Hammerton*, the commissioner appointed in the place of *William Dawson*, of *Tadcaster*, resigned, do, in pursuance of an act of parliament, entitled, &c. settle and ascertain that the sum of 2000*l*. be paid unto the Right Honorable Lady *Petre*, guardian to her son *Edward Robert Petre*, as a recompense and compensation for the damage which may happen and be done by totally taking away the water from the mill at *Selby*, in order to make a free and sufficient effluxion of water into the river *Ouse*; and also the sum of 100*l*. be paid to the said Lady *Petre*, guardian as aforesaid, for the stone and materials of the present weir in the dam adjoining the mill, in order to enable me to erect clough doors, and other useful purposes which the same may be wanted for, and making together 2,100*l*., which I think a fair equivalent and compensation for the same. As witness my hand, the day and year above written, *W. Shipton*. To Mr. *Harper*, agent to Lady *Petre*." The defendant is not himself a resiant or inhabitant within the manor and town of *Selby*; but from time to time between the month of *April*, 1813, and the commencement of the action, and while the plaintiffs were possessed of the mill, he caused to be exposed for sale in the house of *Susannah Walker*, his mother, situate within the manor or lordship and town of *Selby*, and she, as his agent and on his behalf, sold there to divers of the resiants and inhabitants of and within the manor, lordship and town, to be spent and consumed within their respective houses within the manor or lordship and town, about eighty stone per week of meal and flour, partly manufactured into bread, and partly unmanufactured, being the produce of, and obtained from, wheat, corn, or grain, not ground at the mill of the plaintiffs. The

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defendant had notice of the existence of the custom at the time of such exposing to sale, and of such sale, and also knew that the corn and grain so by him caused to be exposed to sale, had not been ground at the plaintiffs' mill. The question for the opinion of the Court is, whether the plaintiffs are entitled to recover. If so, the verdict to be entered for the plaintiffs upon such count of the declaration as the Court shall direct. If not, the verdict to be entered for the defendant.

Tindal, for the plaintiffs. Three objections will be raised against the plaintiffs' right to maintain this action. First, that they cannot sue this defendant because he is not "a resiant or inhabitant within the manor and town of *Selby*;" second, that the bringing into the manor and town, flour, that is, corn in a ground state, and selling it there, is no breach of the custom; and third, that the alteration made in the mill has "extinguished, destroyed, or suspended the custom." As to the first objection, it is clear that an action on the case will lie against the defendant, though he be not a resiant, for enabling or procuring a person who is a resiant, to infringe the custom. [*Bayley*, J. Does the declaration allege, or was there evidence to shew, that the resiants could have been supplied with flour by other means?] Certainly not; but that is immaterial. The facts clearly shew that the acts of the defendant have worked a disturbance of the rights of the plaintiffs, and that is enough to support the case. The action may be considered in two points of view; first, as against a defendant who is a stranger to the manor, and second, as against a defendant selling the flour, by the hands of an agent, in the manor. There are many instances where case will lie against a stranger for the disturbance of the lord's rights. The injury done to the lord is the same, whether the person committing it be a resiant or not; therefore there is an injury done and a loss sustained, and wherever there are damnum et injuria, there the action lies. That principle is laid down in *Com. Dig. tit. Action on the case*

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for disturbance, (A. B.) and there are cases which fully support it. *Green* v. *Robinson* (*a*), *Vin. Abr. Mill.* [B.] and the cases there cited. It is plain that there are damnum et injuria here, from the decrees made relative to this custom by the Court of Exchequer, for unless an injury were committed at common law, that Court could have had no power to interfere. It is said, in *Newman* v. *Zachary* (*b*), "if one slander my title, whereby I am wrongfully disturbed in my possession, though I have remedy against the trespasser, I shall have an action against him that caused the disturbance." So here, the plaintiffs have a double remedy, either against the resiants for selling the flour, or against the defendant for enabling or procuring them to sell it. So in 1 *Rol. Abr.* 106. [N.] pl. 4., it is said, "if upon a sale in a fair, a stranger disturbs the lord in taking his toll, an action upon the case lies against him;" and the 9 H. 6. 45., and 9 Co. 50. b., are there cited as supporting the same distinction, and shewing that the lord has in all cases this double remedy. A fortiori then the rule will apply to this case where the defendant has procured persons to sell the flour, as his agents and for his emolument, because by so doing he places himself in the same situation as the actual seller, and the house of his agent must be considered as his own, and constitutes him a resiant within the legal construction of the term. Second, it will be said that the bringing corn, previously ground, into the town, and selling it there, is no breach of the custom. If it is not, then the custom is a nullity, and is perfectly unavailable to the lord. But the defendant has, at least, been guilty of a direct evasion of it. The custom imposes heavy duties upon the lord, and it is but justice that there should be reciprocal obligations on his tenants. *Cort* v. *Birkbeck* (*c*), however, is a decision expressly in favor of the plaintiffs. It was there held, that if by an ancient custom the tenants, inhabitants and resiants of and in a manor, are bound to grind all their corn, grain and malt, which shall be by them used, or spent, *ground*, within the manor, at a particular mill;

(*a*) Hardr. 175. (*b*) Aleyn, 3. (*c*) Doug. 218.

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an action on the case will lie for using and spending *ground*, within the manor, any corn, grain, or malt, *ground elsewhere* than at the particular mill; and if such a custom has been established and confirmed by a decree of the Court of Exchequer, its reasonableness cannot be afterwards controverted, nor the existence of the custom litigated any further before a jury. A similar decision, upon a similar custom, was also given in the case of *the Manchester Mills* (*a*), and as the terms of the custom here are equally ample with those, it is impossible to distinguish this from those cases. *Neville* v. *Buck* (*b*) will be cited on the other side, but the arguments in the progress of the inquiry there, are all in favor of the present plaintiffs, and will be found to be extremely cogent. Third, it will be said that the custom has been extinguished, or suspended, by the alteration of the mill, but this proposition is not tenable. [*Bayley*, J. Is every inhabitant of the manor compelled to purchase wheat, and to send it to the plaintiffs' mill to be ground? If he is, the result may be that he will be starved, for he may not be able to procure wheat, and the plaintiffs would prohibit him from consuming flour ground elsewhere.] That is an imaginary case, not likely to occur; but if there really existed an imperative necessity for procuring flour from elsewhere, the defendant ought to have pleaded and proved the fact. The alterations made in the mill are not of such a nature as to destroy the custom, because the mill remains in esse, and an alteration in its form or structure cannot impair the rights appurtenant to the possession of it. But, it will be said, the act of parliament shews that the lord's right in the mill has been purchased and paid for, and therefore the custom has merged. But that is not so. In *Bro. Abr.* tit. *Grants*, 162, it is said, "a man holds by suit to a mill of the manor of D.; the lord grants over his mill and suit, and dies; the heir of the lord builds another mill; he shall have the suit, for the suit is to the manor, and not to the mill." *Lutterel's* case (*c*). So here, the recompense given to the lord by the

(*a*) Doug. 222. note 13. (*b*) 8 Bro. P. C. 8vo. ed. 106. (*c*) 4 Rep. 86.

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act extended only to the then existing purposes of the act, and did not extend to the rights appurtenant to the mill, for otherwise it would have been no recompense at all. The sum of 2000*l.* was paid merely as an equivalent for diverting the stream, and the commissioner had not, by law, any power to purchase the mill, or to allow compensation for all the lord's interest in and rights arising out of it.

Parke, contrà. The defendant is not a resiant within the town or manor. That is the first, and a fatal objection to this action. The obligation to grind at a particular mill arises either from tenure or by prescription, and no action will lie for not performing it except against those upon whom the obligation devolves directly from one or other of those sources. The defendant is not in that situation; he is a third party, and a stranger, and against such the action does not lie. None of the cases cited on the other side are parallel with the present. Most of them are cases of franchises in tolls, fairs, markets, or ferries, such as by the operation of the common law bind all the king's subjects in common. This is a franchise of a very different and much more limited kind. The plaintiffs stand in the same situation as a man carrying on a particular trade; for any injury done to his trade by fraud or force, the law affords him a remedy, but it does not give him a right of action against another man who bonâ fide sets up in the same trade. In the case of a franchise to collect toll from all who cross a certain ferry, no action will lie against any person for merely not crossing the ferry; consequently, if an action did not lie against him who prevents another from crossing it, the owner would have no remedy at all; but that is a very different case from the present, and the distinction is illustrated by several authorities. *Year Book*, 22 H. 6. 14. 15. *Blissett* v. *Hart* (*a*) and *Keeble* v. *Hickeringill* (*b*). In *Green* v. *Robinson*, it is true that a Court of Equity interfered for the benefit of the lord, but that forms no precedent, and imposes no obligation upon a court of law; and in a

(*a*) Willes, 512. note.

(*b*) 11 East, 574. note.

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court of law, therefore, that case is not an authority in favor of the present. Second, the bringing into the manor corn already ground, and selling it there, is no breach of this custom, for the language of the custom itself, and of the decrees confirming it, is expressly confined to "corn and grain." [*Abbott*, C. J. This certainly seems to be a strong objection. Suppose an inhabitant of the manor has no grain, and is unable to procure any; may he not purchase meal or flour and consume it in his family?] *Neville* v. *Buck* is decisive to shew that this is a fatal objection, and in that the former case of *Cort* v. *Birkbeck* was in effect overruled. The decree there tallied precisely with the decrees in this case, and the question before the court was confined to one point, and was almost exactly the same as that arising out of this second objection, with these differences, that the breach there alleged was the buying, whereas here it is the selling flour (a difference which makes that even a stronger case than the present), and that there a contradictory custom was set up. The House of Lords, however, decided in that case that the buying of meal and flour, ready ground at foreign mills, was neither a breach nor an evasion of the custom; and it will appear, upon reference to the report, that their decision was founded on very wise and substantial reasons. The alteration of the times and manners, which has obtained since this custom originated, has unavoidably rendered it less beneficial to the lord than it formerly was, but it does not therefore follow that the Court will now extend it, so as to increase the emoluments of one individual at the expense of the convenience and accommodation of the inhabitants of a whole district. This is, in short, a mere question of contract evidenced by usage, and it is plain that neither the contract originally, nor the mode in which it has been acted upon from time to time, extends to the acts which are now charged upon the defendant as a breach of the custom. Lastly, the alteration of the mill has extinguished the custom. The custom appertained to two water corn mills, worked by streams of water. They were subsequently converted into

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one water corn mill, having a wind corn mill above it; and that has ultimately been transformed into a corn mill worked by steam, with a wind corn mill above it. Nothing can be more dissimilar than the present building from that with which the custom originated; in fact, it is a different mill: it is not the mill at which the resiants were or are bound to grind, but another mill, at which they have no obligation to grind at all. The lord has deteriorated his franchise by his own act; it has not been deteriorated by the act of God; and therefore he is not entitled to any remedy. *Lutterel's* case (a), which is cited on the other side from *Brook's* Abridgement, is distinct from this; that was a question of tenure, and the right claimed there was attached to the signory, not to the mill, and therefore stood on a different footing.

Tindal, in reply, was desired by the Court to confine himself to the second point. *Neville* v. *Buck* does not govern this case with reference to the second point. The issue directed by the Court there was ordered for the purpose of trying contradictory evidence as to the extent of the custom. That question did not arise in the first suit, nor was it directly in issue in the second; but in the course of that it did arise incidentally, as a question of fact and not of law, and therefore the Court did, as indeed they were bound to do, direct an isue to try how that fact was. But *Cort* v. *Birkbeck* is expressly in favor of these plaintiffs, and is similar to the present case in the form of the declaration, and in the nature of the evidence, and the judgment given there is precisely applicable to this case, and ought to decide it. [*Holroyd*, J. One of the counts there contained negative words as to the use of corn, grain, or malt, ground, which had been ground *elsewhere* than at the plaintiff's mills.] It did so, but that does not vary the effect of the judgment, because judgment was not entered upon that count; in all other respects the

(a) 4 Rep. 86.

two cases are parallel. [*Bayley*, J. The customs declared upon are not precisely the same in the two cases.]

ABBOTT, C. J.—The plaintiffs have alleged and proved an immemorial custom for all the tenants, resiants, inhabitants and dwellers of and within the manor, to grind at the lord's mill "all *their* corn and grain, which, after the grinding thereof, had been or should be expended or consumed, in a ground state, in their respective dwelling-houses, within the manor;" and they complain that the defendant has sold, within the manor, to the inhabitants, to be by them there consumed, a quantity of corn and grain in a ground state, which had been ground at other mills; and that he has done so there is no doubt. Now, this act of the defendant gives the plaintiffs no right of action unless the custom so alleged and proved, makes it incumbent upon the inhabitants not only to grind all their own corn at the plaintiffs' mill, but to use only such flour as has been ground there, and therefore the first question is, whether the custom does or does not extend so far as to impose upon them that obligation. I am of opinion that it does not, and I think the case of *Neville* v. *Buck* is precisely in point, and fully warrants us in forming that opinion. The custom there relied on was in substance and effect the same as the custom now under review, and the right there contended for was as nearly as possible the same as in this case. It is said that the issue there was directed for the purpose of ascertaining the balance of conflicting evidence, and of trying the merits of two contradictory customs; but upon an attentive consideration of the case it seems to me that that was not the object, or at least not the only object the Court had in view in directing an issue. The further obligation, to use only such corn as had been ground at a particular mill, was there insisted on as a necessary consequence of the custom proved by the appellants, and it was admitted that the question for decision was "a question of construction" of that custom.

Upon that ground, and upon a view of the whole case, it seems to me that the judgment of the Court there turned entirely upon the construction and extent of the custom, and it was certainly held that the custom did not draw after it the further obligation contended for. I think we have the same question to decide, and must decide it in the same way, here; for I am unable to distinguish, in any substantial particular, one case from the other. It would, as it seems to me, be most extraordinary if a custom such as this could draw after it the obligation here insisted on. It may be perfectly fair that the inhabitants should be bound to grind all their own corn at the lord's mill, and for that they may have an adequate equivalent and consideration; but it would be equally unfair that they should be restricted from using any flour not ground there, because for that they can have no consideration or equivalent whatever. We know, from history, that at the time when this custom originated, almost every consumer of flour was also a grower of corn; but a lapse of five or six centuries has wrought an entire change in that respect. In the present day, comparatively few of the consumers are growers; and at any rate there is in every manor a considerable portion of the inhabitants who have no possible means of growing corn. Where are such persons to obtain bread, if they may consume only such meal as the plaintiffs have ground? They would be placed in a situation of grievous and intolerable hardship. Where could they procure corn for the purpose of having it ground by the plaintiffs? There is no obligation upon the lord to supply them with corn for that purpose, nor with flour already ground at his mill, and therefore they might be utterly destitute of any supply at all. Upon the authority, therefore, of the case I have mentioned, and upon the plain and just sense and reason of the thing, I am of opinion that this action cannot be maintained. The judges who decided the other case of *Cort* v. *Birkbeck* are undoubtedly entitled to the greatest respect; but that was in some particulars a very

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different case from the present, and the question there raised was in a shape extremely inconvenient and ill adapted for the true consideration of the defendant's rights and liabilities; otherwise, I cannot help thinking that the Court there would have come to a different decision. As it is, I confess I am by no means satisfied of the propriety of that decision, and at all events I am convinced that it is not binding upon us as a precedent on the present occasion. I am therefore clearly of opinion, that judgment must be entered for the defendant in this case.

BAYLEY, J.—It is a sound and general rule that customs of this kind are to be construed strictly. The custom here is for the inhabitants to grind all *their* corn, &c. at the plaintiffs' mill. "Their corn," must mean *their own* corn, such corn as they themselves have grown, and the custom therefore can extend to those only who have in their possession corn to grind. This custom, like all others of a similar kind, originated in the mutual benefit and convenience of the lord and the tenants; but if it is to extend to those who grow no corn, that object will be defeated, and while large profits accrue to the lord, great prejudice and inconvenience will be imposed on the tenants. Look at the consequences of such an extension of the custom. I am an inhabitant of the town and manor; but I grow no corn. I have no means of doing so; and if I am not able to purchase corn in the manor, I am prohibited from purchasing either corn or flour elsewhere, and must absolutely be debarred from having bread to eat. In *Cort* v. *Birkbeck* a difficulty at first arose as to the extent of the custom, whether it would extend only to corn growing in the manor, and ground there, or to all ground corn wherever it might grow, which was consumed within the manor; but it appearing from the answers in the suit in the Exchequer that the defendants then insisted on the restrained sense, and that they were not bound to grind corn which grew out of the

manor at *Settle* Mills, and the decree having established the custom to the extent then insisted upon, and proved it reasonable, the Court gave judgment for the plaintiff. In that case there was a demurrer to the evidence, and the first question was, whether the language of the decree supported the whole of the averments in the first and fifth counts. The Court certainly were of opinion that it did. I have attentively perused the judgment of Lord *Mansfield* upon the first count, and it seems to me that his reasoning there does not warrant his conclusion. Then, upon the demurrer, the question was, whether the evidence warranted the conclusion attempted to be drawn from it, which Lord *Mansfield* thought it did. I confess I think it did not. I think all that could properly be inferred from it was, that the defendant was bound to grind his own corn at the lord's mill, but not that he was precluded from buying flour that had been ground elsewhere. The verdict, however, was not entered on the first count, and on the fifth count a motion was obtained to arrest the judgment. That count stated that the defendant "did knowingly, &c. use and spend ground within the manor divers large quantities of corn, &c. of the defendant, which had been ground elsewhere than at the plaintiff's mills, and which the defendant, at the time of using and spending thereof, knew to have been ground elsewhere, &c." charging, in effect, that the defendant had sold his own corn in a ground state, having been ground elsewhere than at the plaintiff's mill. Then came the case of *Neville* v. *Buck*, which goes all the length of the present, and passes what appears to me to be a proper commentary on *Cort* v. *Birkbeck*. There the extent of the custom was fully considered; and the Duchy Court was of opinion that the words "his corn" did not extend to cases where the party had no corn of his own, and an issue was directed to try that question, which clearly implied that there was then at least a doubt whether it did so extend; and finally the House of Lords decided that that was a proper question to try; and limited the construction of the

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custom accordingly. I am decidedly of opinion that this custom extends only to those who have corn in the manor, and that if it could extend further it would be bad in law, as being unjust and unreasonable. I am therefore of opinion that the plaintiffs cannot maintain this action.

HOLROYD, J. concurred (a).

Judgment of nonsuit entered.

(a) *Littledale*, J. was sitting at Nisi Prius for the Lord Chief Justice.

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By the custom of a manor the tenants, resiants and inhabitants thereof were bound to grind all their corn, grain, and malt, as well growing within the manor as brought from other places, and spent ground in their houses, at *two* ancient mills belonging to the lord, *or one of them*, at their own option; and the lord having pulled down one of the mills so as to deprive the tenants, &c. of their option: Held, that the custom was suspended.

THIS was a similar action to the last, and the declaration varied only in alleging, that the custom extended to malt; that the defendant was an inhabitant of the town and manor; and that he ground elsewhere than at the plaintiffs' mill, for the purpose of using in his house, and did afterwards use there a quantity of malt, in breach of the custom. Plea, the general issue, and issue thereon. At the trial before *Bayley*, J. at the *Yorkshire Lent* Assizes, 1820, the plaintiffs had a verdict, damages one shilling, subject to the opinion of the Court upon the following case:

The plaintiffs at the time of committing the alleged grievances were in possession of the mill hereinafter particularly described, as the lessees thereof, under the lord of the manor of *Selby*. Before the alterations hereinafter particularly mentioned there were two ancient water corn mills, and one ancient horse mill, belonging to the lord of the manor of *Selby*, and situate within the manor or lordship and town of *Selby;* between fifty and sixty years ago the two water mills were pulled down, and one water corn mill was erected instead thereof, upon their scite, having a wind corn mill over the same. About the year 1806 the streams of water

by which the water corn mill had been worked were diverted from the said mill, under the authority of the act of parliament, in the manner hereinafter particularly mentioned, and the said water corn mill has ever since been and still is worked by steam instead of water. From time immemorial there has been an ancient custom within the manor of *Selby*, "that all and singular the tenants, resiants, inhabitants, and dwellers, of and within the said town and manor of *Selby*, used, and were accustomed, and of right ought to grind all their corn, grain and malt, as well growing within the said manor, as brought from other places and spent ground in their houses within the said manor, at the said ancient mills of the lord, *or one of them*, paying a certain toll or mulcture for the same;" and this custom still continues to exist within the said manor, and to be applicable to the present mill, unless the alteration of the mill, as before described, or any other circumstance stated in this case, shall be deemed to have extinguished, or suspended, or destroyed the said custom. The horse mill was situate in a place called the *Abbey Kiln*, at about five hundred yards distance from the water corn mills. It contained one pair of stones, used for the purpose of grinding malt only. The malt was sometimes brought by the tenants of the manor to the water mills, and sometimes to the malt mill, to be ground, and sometimes fetched by the tenant of the mill, but it was more usual to take it to the water mill. It was more convenient to some of the inhabitants of *Selby* to carry to the horse mill than to the water mills. At the water mills both corn and malt were ground with the same stones, if the miller thought proper to grind the malt there. There was no dwelling attached to the horse mill, nor did any body live or sleep there. The miller kept no person constantly there to receive the malt, but occasionally a person went there from the water mill, when the miller wanted to grind the malt there, or when notice was given. When no person was there the inhabitants taking malt to the horse mill could at any time get the key. About ten years since and before

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the cause of action, the owner of the mills entirely removed the horse malt mill, since which time the malt which has been brought to be ground at the *Selby* mills has been ground at the steam mill erected as hereinbefore mentioned. The act of parliament, and the award of compensation to Lady *Petre*, were then set out as in the former case, and the case then proceeded as follows: The defendant is a resiant and inhabitant of the town and manor of *Selby*, and from time to time between the month of *April*, 1813, and the commencement of this action, and while the plaintiffs were so possessed of the said mill, ground and caused to be ground at his own mill in the manor or town of *Selby*, fifty quarters of malt, which malt was so ground in order that the same might be, and the same was accordingly manufactured into ale, beer, or other malt liquor, the principal part of which malt liquor was sold to divers persons, resiants and inhabitants within the said manor, and a small part thereof was spent and consumed by him in his dwelling-house within the said manor and town of *Selby*. Th learned Judge was about to leave the question to the jur whether the inhabitants had the option of carrying to the horse mill or water mills, stating his own impression that they had, and if they had, that the custom was extinguished or suspended; but by consent of the parties it was agreed that the facts should be stated in the form of a special case for the opinion of the Court, whether, upon the whole, such direction of the learned Judge was right, and whether the jury ought to have found accordingly; the Court being at liberty to draw any inference they think a jury ought to have drawn, and to direct the verdict to be entered for either party.

Tindal, for the plaintiffs. The only important particular in which this case differs from the former, is, the statement of facts respecting the horse mill, and the only question arising out of that statement is, whether the removal of the horse mill and the consequent alteration of the lord's mill,

generally, has in point of law the effect of extinguishing or suspending the custom. The removal took place only ten years before the commencement of the action; therefore it is clear that it has not extinguished the custom; and it only remains to consider whether it has suspended it. In order to decide this point the nature and situation of the mill must be considered. If it had been shewn that the removal of the horse mill had worked any real inconvenience to the defendant, that would have been a good answer to the action; but there is no evidence to that effect, nor from the nature of the mill does it seem possible that there could be. The horse mill was no integral part of the mill in respect of which the custom arose, and seems to have been built and used, rather as a matter of ease and convenience to the owner than to the inhabitants. [*Bayley*, J. It might sometimes be of great convenience to the inhabitants. Suppose the other mill was short of water, and could not be worked; while the horse mill remained they could have their malt ground there; but when it was gone they would be obliged to wait till the other mill was again in a situation to be worked.] Even if that were the fact, still it was the duty of the defendant to allege and prove it in answer to the action; the plaintiffs were not bound to prove the negative of that fact. There is nothing in the case calculated to shew that there was any obligation on the plaintiffs to keep up or continue the horse mill, and therefore the removal of that cannot be any suspension of the custom with reference to the present defendant, because he, as a rèsiant and inhabitant of the manor, was bound to grind his malt at the other still existing mill of the lord. [*Abbott*, C. J. It certainly does not appear, one way or the other, whether the defendant was inconvenienced by the removal of the horse mill.]

Parke contrà.—The argument on the part of the defendant may safely be confined to the closing paragraph of the special case, which states that "the learned Judge was about to leave the question to the jury whether the inhabi-

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tants had the option of carrying to the horse mill or water mill, stating his own impression that they had, and if they had, that the custom was extinguished or suspended;" because the Court must be of opinion that "such direction of the learned Judge was right," and that "the jury ought to have found accordingly." It is impossible not to infer from the facts found by the case that the inhabitants had the option of carrying their malt to either of the mills, and if so, the custom must necessarily be suspended by the removal of one of the mills, because by that removal the option is gone. But there are several other objections to the maintenance of this action, any of which will be a complete answer to it. In the first place, the custom, for a breach of which the plaintiffs seek compensation, is not properly set out in the declaration: It states that the plaintiffs were possessed of *a mill*, and that the tenants, &c. ought to grind all their malt, &c. at *the said mill;* whereas it appears by the case that the plaintiffs were possessed of two mills, and the declaration therefore should have averred either that the tenants were bound to grind at both, or at one or other, and which of the two mills. *Coryton* v. *Lithebye* (a). [*Bayley*, J. The declaration does not aver a prescriptive obligation on the tenants to grind at the mill, but only an obligation to grind there at the time to which the declaration applies. At that time the horse mill was removed, and therefore the averment seems to me to be sufficient.] Then it is said, there is no proof that the defendant was put to inconvenience by the removal of the horse mill; but that is quite immaterial. This is a question of custom, and a custom in a manor extending to some of the inhabitants and not to others, as this does, is clearly bad in law. But the facts of the case satisfactorily shew that the defendant must have experienced inconvenience. It is plain that a given quantity of malt would be ground more expeditiously by two mills worked at the same time, than it could be at one only, and therefore while both were continued, the defendant, as one

(a) 2 Saund. 112.

of the inhabitants, would be served more speedily than he can be now that there is but one. Again, the declaration states the custom to be for the inhabitants to grind all *the* malt which should be used in their houses at the plaintiff's mill; now it should have said all *their* malt, for the jury have decided that the custom extended only to such malt as was grown within the manor.

Tindal, in reply, shortly re-urged his former arguments, contending that the only question was whether the custom was suspended; that it could not be suspended unless the removal had worked some injury to the defendant; and that, as no evidence of that nature was adduced, the custom must be considered as still binding.

Abbott, C. J.—I think it is competent to us, from the facts detailed in the case, to infer that the defendant, in common with the other inhabitants, had the option of carrying his malt either to the horse mill or to the water mill, as his own convenience suggested, and that if both the mills had been continued, he would occasionally, as circumstances varied, have had recourse to them both. Drawing that inference, we must say that the lord had no right to deprive him of that option, and that by doing so, he has suspended the custom. It is conceded that if the defendant had proved that the removal of the horse mill was a matter of inconvenience to him, no action could be maintained against *him* for not grinding at the water mill; but the effect of that concession seems to me to be fatal to the custom altogether, because it goes to separate and break the custom, and to make it binding upon some of the inhabitants only, whereas the plaintiffs declare upon it as binding upon all. To allow the existence of such a custom would be to produce endless vexation and disputes, because in every instance an inquiry would be necessary whether the particular individual was or was not inconvenienced, and that inquiry would

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in almost all instances probably terminate in litigation. I am of opinion, therefore, that by pulling down the horse mill the lord has suspended the custom, at least till it is rebuilt, and consequently that this action cannot be maintained. The verdict, therefore, must be entered for the defendant.

BAYLEY, J.—I am of the same opinion. There is ample evidence of the enjoyment of the option to grind at either mill; one of the mills is removed; then the option is gone, and with it the obligation to grind at all. That obligation may possibly be restored when the mill is replaced, but during the interval it is certainly suspended.

HOLROYD, J.—The case finds that there were two mills, one of which was used exclusively for the grinding of malt. This action is brought for grinding malt at a third mill, but the malt mill has been pulled down, and there is no obligation upon the defendant to grind malt at the corn mill. At any rate the option which he had of grinding it at the malt mill has been taken from him, and till that is restored no action will lie against him for grinding it elsewhere.

Judgment for the defendant (*a*).

(*a*) *Littledale*, J. was sitting for the Lord Chief Justice at Nisi Prius.

G. HANNAM, Esq. *v.* J. MOCKETT.

No action will lie for disturbing a rookery.

DECLARATION in case stated that before and at the time, &c. plaintiff was lawfully possessed of a certain close of land, with certain trees growing and being thereon, situate, &c., to which said close, and trees so growing and being thereon, divers great numbers of rooks had been and were used and accustomed to resort and come to the said trees,

and to settle, build nests, breed and rear their young to, in and upon the said trees, by means whereof plaintiff had been and was used and accustomed to kill and take divers great quantities of the said rooks and the young thereof, and thereby divers great profits and advantages had accrued and still of right ought to accrue to him, to wit, at, &c.; yet defendant, well knowing, &c., but contriving and wrongfully and maliciously intending to injure plaintiff, and to alarm, affright and drive away the said rooks, and to cause them to abandon and forsake the said trees and their nests built therein and thereon, and to prevent other rooks from resorting thereto and settling in and upon the said trees, and to deprive plaintiff of the profits and advantages so arising from the said rooks and the young thereof as aforesaid, did theretofore, to wit, on, &c. at, &c. and on divers other days and times between, &c. wrongfully and unjustly cause divers guns, loaded with gunpowder, to be discharged near to the said close, and with the noises of the discharges of the said guns and the smell of the said gunpowder, did disturb, terrify and drive away divers rooks there being in or near the said close and trees, insomuch that divers, to wit, 1,000 rooks, which before that time had been used and accustomed to resort and come to the said trees, and to settle, build nests, breed and rear young, in and upon the said trees, then and there flew away, and abandoned the said close and trees and the nests built therein and thereupon, and have wholly forsaken the same; and divers, to wit, 1,000 other rooks, which were then about to resort and settle in and upon the said close and trees, were thereby prevented from so doing; whereby plaintiff hath been from thence hitherto, and still is prevented from taking and killing rooks and the young thereof in such plenty as he otherwise might and would have done, and thereby hath lost and been deprived of the profits and advantages which might and would otherwise have accrued to him therefrom, to wit, at, &c. Second count, that plaintiff was lawfully possessed of a certain dwelling-house and

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certain closes of land adjacent thereto, with a certain vivary, called a rookery, in and upon one of the said closes, situate &c., to which said rookery divers great numbers of rooks had been and were used and accustomed to resort and come, and to build nests, abide, breed and rear their young in the said rookery, by means whereof plaintiff was used and accustomed to derive great profit and advantage from killing and taking the said rooks and the young thereof, and the said rookery was ornamental and advantageous to the said dwelling-house and closes, and afforded great satisfaction and delight to plaintiff, to wit, at, &c.; yet defendant, well knowing the premises, but contriving and maliciously intending to injure and aggrieve plaintiff on, &c. wrongfully and unjustly did cause divers other guns, loaded with gunpowder, to be discharged near to the said rookery, and with the noises of the discharges of the said last-mentioned guns and gunpowder, did disturb and terrify divers of the rooks then being in or near the said rookery, insomuch that divers, to wit, 1,000 of the last-mentioned rooks, which had before that time been used and accustomed to resort and come to the said rookery, and to build nests, abide, breed and rear their young in the said rookery, then and there flew away, and wholly forsook and abandoned the said rookery; and divers, to wit, 1,000 other rooks, which were then about to resort to and settle in the said rookery, were thereby prevented from so doing, to wit, at, &c., by means whereof plaintiff hath been, &c. and still is deprived, not only of the satisfaction and delight, but also of the profits and advantages which otherwise might and would have accrued to him therefrom, and hath been otherwise greatly injured and damnified, to wit, &c. to the damage of plaintiff of 200*l*. Plea, the general issue, not guilty, and issue thereon. At the trial before *Graham*, B., at the *Kent* Summer Assizes, 1823, a general verdict was found for the plaintiff, damages 10*l*.

In *Michaelmas* Term last, *Bolland* (with whom was

Chitty) moved to arrest the judgment on two grounds; first, that no action would lie for the disturbance of a rookery, rooks being animals feræ naturæ, and in which no man could acquire any legal property; and second, that the declaration was insufficient, for not shewing that the plaintiff had in point of fact been damnified, and consequently had not shewn any cause of action. First, this is an action on the case for a disturbance. Such an action may be maintained for an injury done to any thing in or to which a man has a legal property or right; but it will not lie for disturbing a rookery, because a man cannot have any legal right or property to or in rooks. [*Best*, J. When they are dead do they not become property, and in that state had not the plaintiff a right to them?] They are feræ naturæ, therefore he had no property in them, alive or dead, unless he tamed or domesticated them. Lord *Coke* lays down the rule upon this subject in *The case of Swans* (a), where he says, "There are three manner of rights of property: scil. property absolute, property qualified, and property possessory. A man hath not absolute property in any thing which is *feræ naturæ*, but in those which are *domitæ naturæ*. Property qualified and possessory a man may have in those which are *feræ naturæ*, and to such property a man may attain by two ways, by industry, or *ratione impotentiæ et loci*; by industry, as by taking them, or by making them *mansueta*, i. e. *manui assueta*, or *domestica*, i. e. *domui assueta*; but in those which are *feræ naturæ*, and by industry are made tame, a man hath but a qualified property in them, scil. so long as they remain tame, for if they do attain to their natural liberty, and have not *animum revertendi*, the property is lost; *ratione impotentiæ et loci*: as if a man has young shovelers or goshawks, or the like, which are *feræ naturæ*, and they build in my land, I have possessory property in them, for if one takes them when they cannot fly, the owner of the soil shall have an action of trespass, *Quare boscum suum fregit, et tres pullos espervor' suor'*, or *ardear' suar'*, *pretii tantum, nuper in eod'*

(a) 7 Rep. 16.

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bosco nidificant', cepit et asportav'; and therewith agreeth the Regist. and F. N. B. 86. L. and 89. K. 10 Ed. 4. 14. 18 Ed. 4. 8. 14 H. 8. 1. 6. Staundf. 25. b. &c. *Vide* 12 H. 8. 4. and 18 H. 8. 12. But where a man hath savage beasts *ratione privilegii*, as by reason of a park, warren, &c. he hath not any property in the deer, or conies, or pheasants, or partridges; and therefore in an action, *Quare parcum, warrennum*, &c., *fregit et intrav', et 3 damas, lepores, cuniculos, phasianos, perdices, cepit et asportavit*, he shall not say (*suos*) for he hath no property in them, but they do belong to him *ratione privil'* for his game and pleasure, so long as they remain in the privileged place; for if the owner of the park dies, his heir shall have them, and not his executors or administrators," &c.; and he cites *Parlet* v. *Cray* (*a*), which shews that the same principle extends to fish in a pond, which, "the owner dying, and leaving them in the ponds, they are as profits of the freehold, which the executor shall not have, but the heir, or he who hath the water." [*Bayley*, J. Still, according to my Lord *Coke*, animals feræ naturæ are the subject of property.] Only ratione privilegii; and not in such a sense as will support an action at law for disturbing them. Rooks were very early the subject of legislation, but the laws affecting them had in view, not their protection as property, but their destruction as vermin. 24 *Hen.* 8. c. 10. and 8 *El.* c. 15. These statutes have long since ceased to operate, but they are still of use to shew that rooks have, from the earliest ages, been considered as vermin, and undeserving the protection of the law. [*Bayley*, J. I believe young rooks are an article of food.] Partially, perhaps, of late years; but by no means properly or universally. Such was the old law, and so it stood, until it was in some degree broken in upon by *Carrington* v. *Taylor* (*b*) and *Keeble* v. *Hickeringill* (*c*), which were actions on the case for disturbing decoys. It was indeed at last held that those actions were maintainable, although the point was for some time

(*a*) Cro. El. 372.

(*b*) 11 East, 571. S. C. 2 Camp. 258.

(*c*) 11 Mod. 74, 130. 3 Salk. 9. Bull. N. P. 79.

much doubted; but those cases and the grounds upon which they were decided, were so widely distinct from the present, that they will not assist the present plaintiff. The main ground of those decisions was, that the owner of a decoy quasi carried on a trade by means of it, and that as the public on the one hand was benefited by the markets being supplied with wildfowl, and the owner on the other hand was benefited by furnishing such supplies, wildfowl ought to be protected as property, and the owner ought to have his remedy against any who injured his trade and diminished his profit. It is, however, to be observed, that the dictum of *Powell*, J. in the latter of these cases,—"Every one has a property of things *feræ naturæ, ratione soli,*" is far too broad and general, and is opposed by the definition of Lord *Coke*, already cited, who says that the property in animals *feræ naturæ* is only a qualified property, namely, so long as they remain tame. [*Bayley*, J. I think the case of *Sutton* v. *Moody* (*a*) goes all the length of Mr. Justice *Powell's* dictum; and my Lord *Coke* says that a qualified property in animals feræ naturæ may be attained ratione impotentiæ et loci, which is much the same thing as ratione soli.] In *Playter's* case (*b*) it was held that trespass for taking fish would not lie without averring and shewing that the fish taken were edible and valuable, and that decision is recognised by Lord *Holt* in *Keeble* v. *Hickeringill*; but that case and *Carrington* v. *Taylor* both pre-supposed and were founded upon the fact that the plaintiff had a property in something valuable, in the enjoyment of which he had been disturbed. Now that feature is wholly wanting to this case. Suppose one man chuses to keep a flock of 500 magpies upon his land, which do damage to the land of his neighbour; may not the latter use the necessary means to drive them away? [*Bayley*, J. That is hardly a case in point, because the magpie, I believe, is never in any degree useful or valuable. *Best*, J., or suppose my neighbour is an old lady, much attached to cats, which we know are domestic and valuable

(*a*) 3 Salk. 290.

(*b*) 5 Rep. 35.

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animals, and chuses to keep so many of them that they overrun my house, and do me damage; may I not destroy them? *Bayley*, J. Undoubtedly you might, if you acted bonâ fide in protection of your own property.] Cats are tamed animals, and therefore would stand upon a different footing from rooks. [*Bayley*, J. Is not the young rook quodammodo tame; may not the plaintiff have a property in the young rooks ratione impotentiæ?] There must be a profit arising from the animals, or they cannot be the subject of property. That principle was recognised in *Dawney* v. *Dee* (*a*), where the Court said, "It sufficeth to allege a general disturbance; so, it is usual to allege it in an action for disturbing one to use a fair or market, or to hold courts, *and take the profits*." So a distinction of the same kind is taken in *Carrington* v. *Taylor* (*b*), where it was said, that although an action might be maintained for disturbing a decoy, yet none could be supported for frightening game from a preserve, while a man shot upon his own land. Now if that be law, why should a protection be extended to rooks which the law denies to be game? [*Bayley*, J. The difference is very obvious, and consists in the intention of the party. The owner of a preserve never means to take the young or the eggs of the game.] He may do so, and in point of fact not unfrequently does, for the purpose of domesticating them, and breeding them in a tame state. The real distinction between game and wildfowl seems to be, that the former are feræ naturæ even in the preserve, but the latter when allured into the decoy cease to be so. [*Bayley*, J. Can we say that this defendant has acted bonâ fide in what he has done?] That is immaterial. In *Rex* v. *Sutton* (*c*), which was the case of an indictment against the defendant for laying poisoned grain on his own land, for the purpose of its being eaten by his neighbour's game, and which was charged to be done maliciously, it was held that the indictment would not lie. [*Best*, J. And very properly; but would not an action have been maintainable?] It is submitted that it would not. To

(*a*) Cro. Jac. 604. (*b*) 2 Camp. 258. (*c*) Not in print.

hold that this action is maintainable will be productive of many mischievous consequences. It will be setting up a perfectly new species of property, and will give rise to a multitude of new actions. The animals now sought to be protected by the law are notoriously noxious and injurious in their nature and habits, and therefore have no claim to favor from the law. It is said by Lord *Coke* (a) that no man can legally have a dove-cote except the lord of the manor, for that a dove-cote is a nuisance; and surely the Court will not give the same dignity and importance to a rookery as to a dove-cote. [*Bayley*, J. Would a writ of ad quod damnum lie by the lord against a tenant for erecting a new dove-cote?] It has been held that it will: *Com. Dig. Biens. F.* Then, second, this declaration is insufficient in point of form. There is no averment that the rooks *had* settled, or built, or bred, or reared young, in the plaintiff's rookery: now a rookery is a place where rooks are settled and breeding: till they are so settled at any rate the plaintiff can have no property in them, and therefore sustains no injury by the defendant's acts. [*Bayley*, J. The injury perhaps may be the same, because the defendant by his acts prevents the rooks from going to settle in the rookery, and that is the averment here.] How is it possible for the defendant to divine the intention of the rook, when he sees him feeding on his land, to go and settle in the land of another person? Neither is there any averment that the rooks, or their young, or their eggs, or their feathers, were any or either of them valuable, either for sale or for food; which is a fatal omission, as has been already shewn by some of the authorities cited. Upon all, or either of these grounds, it is contended that this action is not maintainable.

The Court having granted a rule nisi,

Adolphus, in *Easter* Term, shewed cause. The arguments on the other side have proceeded entirely upon a fallacy, occasioned by confounding the idea of right with that of

(a) 5 Rep. 104. 6 Cro. El. 548.

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possession. It has been said that rooks are feræ naturæ and of no value, and therefore that no man can have a property in them; and that they are injurious as vermin, and therefore may be destroyed at pleasure. In support of these assertions some ancient statutes have been cited, of which it is only necessary to observe that they have long been a dead letter, and that they have no sort of application to modern times and manners or to the present case. This action is brought to recover damages, not in respect of the value of the rooks themselves, but of their resort to the plaintiff's trees, and the injury he complains of is the wrongful and malicious destruction of them on, or in their approach to his land, or the disturbance of them by illegal means used on the defendant's land. The Court are not asked to decide whether the plaintiff has or can have a property in the rooks. This may be compared to the case of one man erecting a weir upon a stream to prevent the fish from reaching the water belonging to another man; and for that injury there is no doubt an action might be maintained. Many also of the cases cited are wholly inapplicable to the present, though two of them, *Carrington* v. *Taylor* and *Keeble* v. *Hickeringill*, are analogous to and decisive of it. In the first place it is perfectly notorious that the young of rooks are proper and are commonly used for food. [*Bayley*, J. But that is not averred in the declaration.] It is averred that the plaintiff was accustomed to take and kill the young, and that thereby profit accrued to him. [*Bayley*, J. But not that the profit accrued by the sale of them for food.] The averment that they were taken and killed, and that thereby profit accrued, is sufficient; it is a necessary inference that the object was the sale of them, for there could not possibly be any other mode of obtaining profit by them. But even this argument is not necessary, for the averment that the rookery was a source of satisfaction and delight to the plaintiff, is sufficient to support the action. Many species of animals might be mentioned, the destruction of which would be a serious annoyance and injury to the owner, and yet of which he could

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not directly assert that they were his property, or that they yielded him profit; leeches and bees, for example. It is not necessary to support this action that the plaintiff should have such a property in the rooks, as would render the taking them from him a larceny. [*Bayley*, J. Bees, when hived in a man's garden, are domesticated, and may be followed by him, if they stray, and retaken; and leeches, we know, are extremely valuable for medicinal purposes; they are, therefore, both distinguishable from rooks.] The distinction pointed out is just, but they are all equally feræ naturæ originally, and equally to be protected when the industry of man has induced them to resort to a particular spot belonging to himself. The plaintiff's case rests upon a simple proposition of law, involving this old and sound principle, that the right of one individual, whatever its nature or extent may be, is not to be infringed or disturbed by another. It has been suggested that this declaration is insufficient, for not averring that the rooks had actually settled and bred in the plaintiff's trees, nor that they were articles of food, or of sale. The objection has no weight. It is averred that they were accustomed to resort to the plaintiff's trees, and to settle and breed there, and that the plaintiff was accustomed to take and kill the young, and thereby to make a profit, and that is quite sufficient. The defendant, by his wrongful acts, has driven away the rooks, and therefore it was impossible for the plaintiff to say that they were still in his trees, and there may very well be a profit arising from them, without either selling them or using them as food. [*Bayley*, J. The verdict was taken for the plaintiff generally upon the whole declaration, and therefore if either of the counts appears to us to be bad, we may arrest the judgment. Now the second count merely avers that the rookery yielded satisfaction and delight to the plaintiff.] It avers that the rooks were accustomed to resort to the rookery and to build and breed there, and that the plaintiff was accustomed to derive profit from killing and taking them and their young. [*Bayley*, J. Is there not great difficulty in distinguishing the rook from any other

wild bird or animal in which there can be no legal property; and if there is no legal property in these rooks, how can the plaintiff maintain an action for the destruction or disturbance of them?] If the disturbance is in its consequences injurious in any way to the plaintiff, then it is actionable. Suppose, for instance, a man has a garden frequented by a great number of nightingales, which are birds purely feræ naturæ; that he opens it as a public tea-garden, and that in consequence of the singing of the nightingales much company resorts to it, and the owner derives great profit by their attendance; if his neighbour were to drive away the nightingales, and thus withdraw the company from the garden and destroy his trade, would not that be an injury for which an action might be maintained? Undoubtedly it would, and upon the short ground, that wherever the disturbance is injurious in its effect, the party injured has a remedy at law; it is submitted that this action is maintainable.

Bolland, in support of the rule. There is no analogy between rooks and any one of the animals mentioned on the other side. With respect to fish, they are put on distinct grounds by several express acts of parliament, besides that the salmon and most other river fish must necessarily resort to the fresh waters for the purpose of depositing their spawn, and therefore they come thither, not by the industry of the owner of the water, but by their own irresistible instinct. Bees are notoriously the subject of value and profit in a regular course of trade, and are absolutely domesticated and rendered the property of the person who hives them. Leeches also are the subject of trade and of property, for they are removed by the industry of man from their native marshes into streams where they breed, and from whence they cannot be removed without committing a trespass. All these, therefore, are essentially distinct from rooks. Then, a fanciful case is put respecting nightingales, the answer to which is the maxim, *de minimis non curat lex*. Other similar cases

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might be put, as of the plover, the snipe, and other birds, by collecting the eggs, or the young of which, some persons make a profit; but who ever heard of an action for disturbing the resort of such birds? This declaration is bad for uncertainty, for the allegation that the rooks were "in or near the said close," is any thing but certain. A rookery, in general estimation, is a nuisance, and perhaps it is not too much to say that as such it may be abated by any individual. [*Bayley*, J. It is said also, that a dove-cote is a nuisance; but could a man justify the removing one as such?] The argument certainly must go that length, and seems to be founded on authority, as already observed. [*Bayley*, J. What is the ordinary food of rooks? that question may be important in this case.] Naturalists have differed long and obstinately upon that question—occasionally, perhaps, worms and slugs, but grain, undoubtedly, when they can obtain it, and in doing so they are, at seed-time and at harvest, very injurious to the farmer. In general estimation rooks are, as has been already observed, vermin and a nuisance, and if the present action is upheld, the Court may hereafter have to decide upon actions for the disturbance of rats, or mice, or any other vermin. *Dunstable* larks are well known as a very extensive subject of trade; yet no action was ever brought in respect of them. Quails also are an article of trade, and the persons who collect them are known to do much damage in disturbing partridges, hares, and other game, which frequent the same covers; yet no effectual resistance was ever made to the right of persons to search for quails. For the reasons already suggested on the part of the defendant, and by the Court, it is clear tha the whole of this declaration, and particularly the second count, is bad, and therefore upon that ground, as well as upon the broad principle that no action will lie in respect of rooks, because no man can have any property in them, the rule for arresting the judgment in this case must be made absolute.

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The Court took time to consider the case, and judgment was now delivered by

BAYLEY, J., and after stating the pleadings, his lordship proceeded to the following effect:—There is no material difference between either of the counts of this declaration, and if either is insufficient in point of law, of course the judgment must be arrested, the damages being general. The plaintiff does not state any right in him to have rooks resort to and settle on his trees, farther than the general right which every one of the king's subjects has to have animals of this description resort to any trees that belong to him. He describes his profit to arise, not from the eggs but from killing the birds themselves and the young thereof; and the question is, whether the plaintiff is or is not entitled to maintain an action of this description. To maintain an action there must be a wrong committed on the part of the defendant, to something which is a right in the plaintiff; and the material point on which our judgment is founded, depends upon the want of right in the plaintiff to animals of this description. This is an action for an injury which the plaintiff is alleged to have sustained, because he has lost the opportunity of killing the birds themselves, and the young thereof, and the question is, whether he has any right to have these animals resort to his trees, although it is alleged that they have been in the habit of resorting thereto. In cases of this description the attention of the Court has always been called to the nature of the animal which is the subject of the action. There is a great distinction between those which are feræ naturæ; some are good for human food and others are not. Whether these animals may or may not be good for food does not appear on the face of this declaration, and certainly they are not, ordinarily speaking, articles of sale. There is also a distinction between animals feræ naturæ which are destructive to a neighbourhood and those which are not, and between those which are protected by particular acts of parliament, and those which

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have no such protection. If then, upon investigating this case, it shall turn out that these animals are not protected by any statute, that they are destructive to the neighbourhood in which they are, and are so considered by the law, it follows that no man can have any right to insist that they shall come to his premises, and maintain an action against a person who drives them away. In the argument upon this case our attention was called to animals not exactly of this description, but the principles applicable to which bear closely upon this subject; I allude to rabbits and pigeons. Before, however, I advert to these animals, I will mention a passage in 2 *Inst.* which points out a distinction which there is between animals which are and those which are not destructive. It is said in 2 *Inst.* 190. that "the common law gave no way to matters of pleasure (wherein most men do exceed), for that they brought no profit to the commonwealth; and therefore it is not lawful for a man to erect a park, chase, or warren, without a license under the great seal of the king, who is *pater patriæ*, and the head of the commonwealth." I do not, however, cite that passage so much for what it contains, as for the purpose of alluding to what is introduced immediately after in the following page, upon the subject of fish-ponds. Lord *Coke* says, "*Vivers* or *viviers* is a *French* word signifying fish-ponds or waters wherein fish are kept and nourished; *which being a matter of profit and increase of victuals any man may erect.*" It is obvious that a fish-pond, constructed on a man's own land, cannot possibly be injurious to his neighbours, but may be beneficial, as tending to increase wholesome food. Then as to the other animals to which I have alluded, it is to be observed, that though rabbits and pigeons are not only subjects of diversion, but constitute important articles of human food, still there are authorities which shew that if they be feræ naturæ a man can have no property in them. First, as to rabbits; in *Bowlstons* v. *Hardy*(a) an action was brought against a man for having made coney

(a) 5 Rep. 105. S. C. Cro. Eliz. 547.

burrows in his own land, which increased in such numbers that they destroyed his neighbour's corn, and it was held that no action lay because he had no property in such animals. It is there said, "if a man makes coney burrows in his own land which increase in so great number that they destroy his neighbour's land next adjoining, his neighbour cannot have an action on the case against him who made the said coney burrows; for so soon as the conies come in his neighbour's land he may kill them, for they are feræ naturæ, and he who makes the coney burrows has no property in them, and he shall not be punished for the damage which the conies do, wherein he has no property and which the other may lawfully kill:" and *Walmesley*, J. says, that "the property of the conies is not in any, nor can any man so keep them but that they will break out of themselves; which is the reason that none can have them in his own land unless by grant from the king, or by prescription; if otherwise, he is punishable in a quo warranto; for the queen hath the royalty in such things whereof none can have any property." And it was resolved in the same case "that none may now erect a dove-cote but he who is lord of the manor, and if any other private man erects it, he is punishable in the leet as a common nuisance, but no action upon the case lies by any private man against him who erects it."(*a*) This doctrine, as to dove-houses, is carried farther than the decision of that case properly required; but that case establishes this position, namely, that although an action cannot be brought against a man who has erected a coney burrow on his own land, yet it is unlawful for him so to erect it. And the king, who is the pater patriæ, may take proper steps to put down that which in his judgment may be injurious to the neighbourhood. *Manwood*, in his Forest Laws, p. 148. ss. 42, 43, 44. also takes notice of this power of the king so to suppress them, although he seems to think that one reason may be, for its exercise, the preservation of game for the pleasure of the king and the great men of the realm.

(*a*) Cro. Eliz. 548.

He says, "For wild beasts of venery, and beasts and fowls of chase and warren, being things of excellency, are, for that reason, more proper for the delight and recreation of a prince, and therefore they belong to him. And this may be the reason why it is not lawful for any man to make a chase, park, or warren, in his own freehold or elsewhere, to preserve such beasts, without the king's grant or warrant so to do. The punishment for making a chase, park, or warren, without such license is by quo warranto, and the franchise may be seised into the king's hands, for such wild beasts do belong to the king." In *Dewell* v. *Sanders* (a) the doctrine as to the right of private individuals to set up a dove-cote, is discussed, and the question arose whether it was or was not punishable in the leet as a nuisance according to the doctrine of *Walmsley*, J. in *Boulston*'s case. In *Dewell* v. *Sanders*, the plaintiff, being a freeholder of a manor, erected a new dove-cote and stored it with pigeons, and suffered them to fly out and in, which was presented in the leet as a common nuisance, and an amercement of forty shillings was assessed upon him for his offence, and for non-payment a distress was taken, whereupon he brought trespass for taking his cattle; and it appears to me that the principle upon which the Court held that the court leet had no jurisdiction over this as a nuisance was put on a very plain and sensible footing. All the judges held "that the erecting a dove-cote by a freeholder who is not lord of the manor nor owner of the rectory, and replenishing it with doves, is not any nuisance inquirable or punishable in a leet, for nothing is inquirable there and punishable but that which is a common nuisance to all people. But this erecting a dove-house cannot be a nuisance but to those only whose corn they eat and not to all persons, and therefore it is no common nuisance inquirable there. Also if it were a common nuisance the lord of the manor nor the parson could not make a dove-house more than any other freeholder, for none can pre-

(a) Cro. Jac. 490. S. C. 2 Rol. Rep. 3. 30.

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scribe to make a common nuisance, for it cannot have a lawful beginning by license or otherwise, being an offence against the common law, for a common nuisance is to the prejudice of all people; and it is a continuing offence and cannot be dispensed with," and therefore they held the opinion reported in *Boulston*'s case to be no law. The Court also in that case took notice that, by particular acts of Parliament, protection was given to dove-cotes, wherefore all the Judges agreed that this was not an offence inquirable nor punishable in a leet; but *Montagu*, C. J. said, "if those who have not any lands at all should erect dove-houses and increase multitude of pigeons to the grievance of the country, it may be inquired of before the Justices of Assize, who have the like authority as to such things, as the Justices in Oyer had to redress them upon the people's complaint; but not every lord within his leet, for the leet is to redress nuisances within the precinct thereof, and not to extend farther; and the erecting of a dove-house is not in itself a nuisance, but the storing it with pigeons and suffering them to fly abroad into the country, which is out of the leet." In the course of the argument *Doderige*, J. said, that "if pigeons come upon my land I may kill them, and the owner hath not any remedy, but the owner of the land is to take heed that he takes them not by any means prohibited by the statutes," to which *Croke* and *Houghton*, Js. agreed, but *Montagu*, C. J. held the contrary, and "that the party hath jus proprietatis in them, for they be as domestiques and have animum revertendi and ought not to be killed, and for the killing of them an action lies;" but the reporter says, "the other opinion is the best." The argument in that case is very fully stated in 2 *Roll's Reports*, 3. 30. In 3 *Salkeld*, 248 (*a*) which, though a book of no authority, has a passage to this effect, which may be mentioned as entitled to great weight for the good sense of it, namely, "A lord of the manor may build a dove-cote upon his land parcel of his manor, and this he may do by virtue of his right as lord

(*a*) Arnold *v.* Jefferson.

thereof, but a tenant of a manor cannot do it without a license, for he can have no right to any privilege that may be prejudicial to others; but this is not a common nuisance, nor punishable in the leet, but the nuisance being particular, the lord shall have an action on the case, or an assize of nuisance, as he may for building a house to the nuisance of his mill." In *Roll's Reports*, 4. it is stated that the king may grant a license to erect a dove-house, and therefore it is not a common nuisance. Now all these authorities have a tendency to shew that, with respect to rabbits and doves, which may be injurious to the lands of others, a party cannot, generally speaking, establish a right to have them, except by custom or prescription, unless he has the king's license or grant for that purpose. He is not at liberty to establish them without such authority, for if he does, the Justices in Eyre or the Justices of Assize may put them down; and the reason for requiring a grant is, that these are animals which no man can appropriate to himself or have a property in them, and for the same reason no man can make a park, chase, or warren, without the license of the king, as pater patriæ, for if he does, a quo warranto will lie. Now that being the general law with respect to animals whose habits are much less destructive than rooks, it is material to see in what light the law, as far as we can collect it from old statutes, considers birds of this description. They are mentioned in 24 *Hen.* 8. c. 10. as nuisances to the neighbourhood where they resort. That statute is entitled, "An Act to destroy choughs, crows, or rooks." It recites, "that they destroy great quantities of corn as well in the sowing as at the ripening and kernelling thereof; that they make a marvellous destruction of the covertures of thatched houses, barns, ricks, stacks, and other such like; so that if they be suffered to breed, as in certain years past, they will be the cause of great destruction of corn and grain, to the great prejudice of the tillers and sowers of the earth." It is then enacted by sect. 2. that the inhabitants of every parish shall, for the period of ten years, provide and set nets for choughs,

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crows and rooks, on pain of forfeiting ten shillings every lawful day such nets shall be wanting. By sect. 3. it is enacted, that the tenants are for ten years yearly to assemble and survey the houses, &c. and conclude by what means it shall be best possible to destroy all the young brood of the choughs, crows, and rooks, for the year, on pain of forfeiting twenty shillings every year they shall omit to assemble. Then by sect. 5. it is enacted, that "any person minding to destroy the said choughs, crows, and rooks, may, after request to the owner or occupier where they haunt or breed, enter and carry away all such rooks, &c. as he shall take the same day, without let by the owner or occupier." By the 25 *Hen.* 8. c. 11. certain provisions are made for the preservation of wild fowl, to which it is not very material to advert. The object of that statute was to prevent the destruction of the eggs of certain wild fowl which are wholesome for food, but particular birds and their eggs are excepted by sect. 6. as follows: "Provided always, that this act extend not, nor be hurtful at any time hereafter to any person or persons that will destroy any crows, choughs, ravens, and bussards, or their eggs, or to any other fowl or their eggs not comestible, nor used to be eaten." In this statute the word "rooks" is omitted, but whether by accident or not it is not material to inquire. The 24 *Hen.* 8. c. 10. continued in force until the 8 *Eliz.* c. 15. which repealed all the provisions of the former statute except as to the keeping of nets for choughs, crows, or rooks. That statute also provided that in every parish sums of money should be raised for the destruction of "noyful fowl and vermin; and for the heads of three old crows, choughs, pies, or rooks, or of six young ones, or for six eggs, is to be given a penny," &c. This statute was to continue in force until the end of the then next sessions of parliament, at which time it dropped. It was never repealed, but was suffered to expire. If indeed it had been repealed it might then be said that a subsequent legislature had taken a different view of the subject, and had considered these animals as being

innocent or innoxious, which the 24 *Hen.* 8. and 8 *Eliz.* had treated as mischievous and noisome; but by that statute being suffered to expire and no contrary declaration of the opinion of the legislature being expressed by any subsequent act, we are to consider these acts as giving the true description of birds of this kind. Then according to the 24 *Hen.* 8. the true description of these animals is that they are "very destructive of corn, as well at the sowing as at the ripening and kernelling thereof, and that they are very destructive of the covertures of thatched houses, barns, ricks, and stacks." Whether they are fit for food or not, we certainly cannot say, but if they be, it certainly is not so alleged on the face of this declaration; and certainly they are not more so, nor so much, as pigeons or rabbits. They clearly answer the description of birds which are feræ naturæ, and, according to this act of parliament, are destructive to the neighbourhood where they resort. There is no act of parliament with which we are acquainted which gives them any protection; but on the contrary, those statutes to which I have alluded, mention them in terms of condemnation. That being the case, can a party claim a right to have them come to his premises, and is he at liberty to say that the person is a wrongdoer who protects the neighbourhood from the mischiefs which they are likely to produce, by driving them away? We are of opinion that these questions must be answered in the negative. No authority has been cited to shew that a party has any right of property in animals of this description. The authorities which have been cited relate to animals which are perfectly innocent, and which are articles of food, and stand upon a very different foundation. This observation applies to *Keeble* v. *Hickeringill* (*a*), and *Carrington* v. *Taylor* (*b*). The former was an action on the case for discharging guns near the decoy pond of another, with the design of injuring the owner by frightening away the wild fowl resorting thereto, and the Court held that the action was maintain-

(*a*) 11 East, 574. (*b*) 2 Camp. 258.

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able. But it is to be observed, that wild fowl are protected by several acts of parliament, and are considered as beneficial to the public, being an useful article of food. In the case of a decoy the owner uses the water on his land for the purpose of forming the decoy; he is at an expense of capital, and employs his personal skill in order to adopt those means which are necessary to draw the wild fowl to the place where they are to be taken, and according to Lord *Holt*, in the case *Keeble* v. *Hickeringill*, that is to be considered as being one mode in which a man uses his land, and it is put in that case upon the footing of being a species of trade. Therefore by disturbing a decoy the owner is prevented from earning his livelihood, and obstructed in the pursuit of a lawful occupation. It is well known that the making of decoys is one mode in which a man uses his land. He lets it at a rent, and it is a valuable species of property. No annoyance is created to the surrounding neighbourhood; the wild fowl are innoxious, and are a productive article of food. The cases therefore to which I have referred stand on a very different foundation from this. The other instances referred to, are of animals specially protected by acts of parliament, or clearly considered the subject of property. Bees, for instance, are considered as domestic, they are an article of property, and may be the subject of larceny. They stand on the same footing with tame pigeons. The case of a fishery is also totally different. Fish are a well-known article of food, and they do no harm to any body. Upon the ground, therefore, that rooks are animals in which a man has no property, and has no right to insist that they shall come to the neighbourhood where he is; that they are birds feræ naturæ, destructive in their habits, and a nuisance to the neighbourhood where they are, and because they have no protection from any act of parliament, we are of opinion that the plaintiff is not entitled to maintain this action, and consequently the judgment must be arrested.

Rule absolute for arresting the Judgment.



WILLOUGHBY *v.* BACKHOUSE and MARSHALL.

A right of action once vested can only be destroyed by a release under seal, or by the receipt of something in satisfaction of the wrong done; therefore in the case of an excessive distress for rent, a tenant does not waive his right of action, though he afterwards enters into a written agreement with his landlord concerning the sale of the effects seized.

CASE for an excessive distress. Plea, the general issue, not guilty, and issue thereon. At the trial before *Bosanquet*, Serjt., at the last *Summer* Assizes for the county of *Buckingham*, the facts proved in evidence were these. The plaintiff was tenant to the defendant, *Backhouse*, of a farm belonging to him. On the 26th *September*, 1822, the defendant *Marshall*, as the agent of *Backhouse*, put in a distress for 175*l.*, rent in arrear, under which he seized the whole of the live and dead stock upon the farm, together with the household furniture, goods and chattels found upon the premises, amounting together in value to the sum of 1,000*l.* The plaintiff, on the same day, signed a written agreement in the following terms.—"To Mr. *T. Marshall.* You having, as the agent of *T. J. Backhouse*, Esq. this day entered a distress on my effects at *Haverfield Lodge*, for the sum of 175*l.* rent, which you claim to be due from me to the said *T. J. Backhouse* at *Lady-day* last, I hereby authorise and empower you to hold possession of the same effects until the 15th day of *October* next, or until such other period, subsequent to the expiration of the five days mentioned in your notice of distress, as you may think proper; and I also authorise and empower you to convert the same effects into money, by the sale and disposition thereof, either by public sale or private contract, and at such time as you may think expedient. And I authorise you to dispense with the form of appraisement required by law in the case of a sale under a distress for rent, and to make such public or private sale without any such appraisement. And I also authorise and empower you, from the produce of the said effects, to pay or retain as well the said sum of 175*l.* as also the further sum of 125*l.*, which on the 29th of *September* instant will, according to your claim, have become due for a further half year's rent, making altogether the sum of 300*l.* together with

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the costs of distress and of such sale and disposition, subject to such reduction as, by the agreement entered into between us, I am entitled to upon quitting possession of the premises in my occupation, for the amount of the outgoing valuation, so that such valuation be completed before the sale of my said effects." It further appeared that *Marshall*, on the 30th of *September*, put in another distress for 125*l.* rent, which accrued due on the preceding day, under which he again seized the whole of the property on the farm, subject to the first distress. The plaintiff had advertised a sale of his property, and had made other preparations for quitting the farm, previous to the entering of the first distress. It was agreed between the plaintiff and *Marshall*, and that agreement was in the result acted upon, that to prevent any prejudice to the sale of the effects, the sale should be conducted in pursuance of the original written agreement, and not as a sale under a distress, and that *Backhouse* should be paid out of the proceeds. Under these circumstances the learned Serjeant left two questions to the consideration of the jury: First, whether the distress was excessive, of which he told them he entertained no doubt; and second, whether the agreement dated on the 26th *September*, and executed by the plaintiff, amounted to an acquiescence by him in the acts done by *Marshall* as the agent of the defendant, adding that, if they thought it did, it was, in point of law, a good defence to the action. The jury found their verdict for the defendant.

H. Cooper, in *Michaelmas* Term last, obtained a rule nisi for a new trial, upon the ground of misdirection by the learned Serjeant, who, he contended, had left to the jury as a question of fact that which was a question of law, and had also been mistaken in point of law in telling them that the agreement of the 26th *September*, was a waiver of the plaintiff's right of action.

Storks and *Dover* now shewed cause. There is no sound

objection to the summing up of the learned Serjeant in this case; on the contrary, his direction to the jury was perfectly correct as respects both the distresses. The jury were desired to find, as a question of fact, whether the plaintiff had acquiesced in the distresses; they found that he had, and the result was, that he had no cause of action. Originally, with reference to the first seizure, the plaintiff, perhaps, had a cause of action for an excessive distress, but that he expressly dispensed with by the agreement, and consented that his property should remain in the custody of the law. While it did so remain, the second distress was levied, but that was merely pro formâ; it was understood and intended by both parties that it was altogether formal, and was to have no effect, and in point of fact it had no effect. The plaintiff sustained no injury even by the first distress. At the time when that was levied, he was in a state of insolvency, and was actually preparing to sell off his effects and to quit the farm; but finding that the defendant had distrained, he entered into an agreement by which he acquiesced in all that had been done. The defendant, not thinking it prudent to rely exclusively upon the agreement as the security for his rent, did undoubtedly levy a second distress, but as matters then stood, that act could not possibly work any prejudice to the plaintiff, and it was rendered necessary for the protection of the defendant, because in the interval more rent had accrued due. Then, with respect to the sale, every thing was done fairly and bonâ fide. [*Bayley*, J. Can we say that the defendant acted properly in distraining goods worth 1,000*l.* for an arrear of rent not exceeding 175*l.*? That is really the only question.] The second distress was in effect no distress at all; all that was done was to serve the plaintiff with a notice of distress. [*Holroyd*, J. And the consequence of serving that notice was that the plaintiff felt himself compelled to enter into the agreement; the effect therefore was the same as if the distress had been completed. *Littledale*, J. A man was left in possession up to the time of the sale; can it be said that such a proceeding

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is not a distress?] The defendant kept possession under the agreement, not under the distress. [*Bayley*, J. The distress was clearly wrongful, and the agreement was wrung from the plaintiff by means of it; it was therefore no consent in point of law, and furnishes no answer to this action. It cannot be said that the landlord acted in a reasonable manner, which he was bound to do: the foundation of the action is the seizure, not the sale, and the seizure, in point of amount, was most unreasonable. Besides, it had a very injurious effect upon the plaintiff, because he was thereby prevented from converting his effects into money upon the most advantageous terms. The agreement, therefore, is illegal, for the law will not allow a man to consent to his own undoing, or to adopt an injury.] In point of fact no injury was done, and certainly that was a question for the jury, and was properly left to them.

Cooper, contrà, was stopt by the Court.

BAYLEY, J.—This is a very plain case, and must be decided in favor of the plaintiff. There was an arrear of rent due to the defendant amounting to 175*l*. and for that sum, and no more, he had a right to distrain. In levying a distress for that sum, he was bound to take care that he did not exceed his right, and though the law in such cases allows the landlord to calculate the value of the goods liberally, so that he may seize enough, it requires him to act with caution and reason, and to avoid every thing like excess: and where it is plain that a part of the property is sufficient, he is bound to seize part only, and is not justified in taking the whole. This provision of the law is just and reasonable, because the unnecessary seizure of the whole of the tenant's effects is a very severe injury to him, as it prevents him from raising money to relieve his necessities by sale or pledge of his goods, which otherwise perhaps he might do. Then how did this defendant act? He seized the whole of the tenant's effects, when a part only would have sufficed, for he dis-

trained goods worth 1,000*l.* for an arrear of rent of only 175*l.* The jury should have been directed to consider whether that was fair, reasonable, and honest conduct, and they ought to have found that such an act was plainly wrongful and unreasonable, which it most undoubtedly was. The plaintiff then has sustained an injury: has he by means of the agreement waived his right to a remedy? That is a question of law, but it was left to the jury as a question of fact. In point of law he certainly had not waived his right to a remedy; he could not do so; the law would not allow him to do so. But in point of fact, what does the agreement amount to? Clearly not to a waiver of his right of action. It provides no satisfaction to the plaintiff for the injury he has sustained, for the defendant does not even bind himself by it to delay the sale. It is an agreement altogether for the benefit of the landlord, and not at all for the relief of the tenant: it is equally unreasonable in fact and invalid in law, and cannot bar the tenant's right to an action for the excessive distress. This principle is not new; it is to be found in the case of *Sells* v. *Hoare* (*a*), where it is laid down as a position of law, that an arrangement between the parties respecting the sale of the goods distrained, did not divest the plaintiff of his right of action. I am clearly of opinion that in point of law the plaintiff was entitled to a verdict, and that the jury should have been so directed. The rule, therefore, for a new trial, must be made absolute.

HOLROYD, J.—I agree that there ought to be a new trial in this case. The jury were clearly misdirected. They were told that if they were of opinion that the plaintiff acquiesced in the distress, he had waived his right of action, and they ought to find a verdict for the defendant. That direction cannot be supported by any sound principles of law. The distress was clearly excessive, and that gave the plaintiff a right of action. Did the agreement release that right of

(*a*) 1 Bingh. 401. S. C. 8 J. B. Moore.

action? No. It gave additional power and advantage to the defendant, but it conferred no benefit on the plaintiff; it was no satisfaction to him in point of law, and therefore was no release of his right of action. No arrangement entered into between the parties after an illegal or excessive distress has once been levied, can affect the claim which the tenant has for damages on account of the original wrong. It was decided in *Sells* v. *Hoare* that the mere seizure, where the distress is excessive, confers a right of action, and no subsequent agreement between the parties can operate as a waiver of that right.

LITTLEDALE, J.—The agreement affords no defence to this action, because the plaintiff's original right of action is not waived. In point of fact, there is no language in the agreement which indicates any such intention, but if there was, in point of law it could not have any such effect. Where a right of action is once vested in a man, it cannot be divested by any parol declaration, or by any agreement not under seal. Where such a defence is set up, the defendant must shew either an agreement by deed to waive the action, or a satisfaction in law rendered to the plaintiff. Here there is no deed; is there any satisfaction? Clearly not; no benefit or advantage is conferred upon the plaintiff, and therefore he has not released his original right to a remedy for the injury he has sustained. I therefore agree that the verdict in this case was wrong, and ought to be set aside.

Rule absolute.

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Replication to a plea of infancy, that the promise to pay was made by defendant, after he came of age, is not sustained by proof of a promise to pay *after* action commenced.

ASSUMPSIT for goods sold and delivered. Plea, infancy. Replication, a promise to pay made by the defendant after he came of full age, and issue thereon. At the trial before *Holroyd*, J. at the *Yorkshire Summer* Assizes, 1823, it appeared in evidence that the promise relied upon by the plaintiff was made by the defendant after he had come of age, but also after the action had been commenced, and on the latter ground it was contended that the plaintiff must be nonsuited, such a promise not being sufficient to sustain an action. The learned Judge, however, declined directing a nonsuit, but reserved the point, and the plaintiff had a verdict, with liberty to the defendant to move to enter a nonsuit.

Brougham, in *Michaelmas* term last, having moved accordingly, and obtained a rule nisi,

J. Williams now shewed cause. The question in this case is, whether, where goods have been supplied to an infant, a promise to pay for them made after he has come of age, and after an action has been commenced against him for the value, will support the action and render him liable. This question, though one purely of law, appears to be new, for no case can be found in which it has been decided. Reasoning by analogy it should seem that such a promise is binding. All the requisites hitherto defined, are, that the promise shall be voluntary, absolute, and made after the party is of full age; and all those requisites are complied with here. This case seems to be analogous to the cases upon the statute of limitations, with respect to which it has been held, " that an acknowledgment of the debt *after the commencement of the action* would take it out of the sta-

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tute." *Yea* v. *Fouraker* (a). [*Bayley*, J. There is this distinction between a plea of infancy and a plea of the statute of limitations; the promise in the former case is to create a new obligation; in the latter it is merely an acknowledgment that a pre-existing obligation is still subsisting.] Still the general analogy between the two seems to be strong, and if a promise made after action commenced will bar the statute of limitations, upon general principles it would follow that it would also be an answer to a plea of infancy. [*Holroyd*, J. In *Yea* v. *Fouraker* it was held that it was not necessary to declare upon the new promise, but that the plaintiff might rely upon the promise made within the six years.] There is a note of a nisi prius case in Mr. *Phillips*'s Treatise on the Law of Evidence (b), where it was held, that a promise laid in the declaration to have been made by a testator, but proved at the trial to have been made by his executor, the testator having died within six years, was good; otherwise it would clearly have been bad. Still it was held that the promise made by the executor was evidence of a subsisting debt from the testator. [*Bayley*, J. All the cases decided upon the statute of limitations differ from the present; here no legal obligation attached upon the defendant previous to the promise on which the plaintiff has declared: that promise was made subsequent to the commencement of the action, and therefore was made too late to support the action.] That reasoning would apply to all the cases upon the statute of limitations. When the six years have elapsed, the original obligation is absolutely gone, and the renewal of it by the new promise is the same as a promise by an adult to pay a debt incurred while he was an infant. When once the statute attaches, the legal liability to pay the debt is removed; but there remains a moral obligation, which the law will enforce so soon as there is any acknowledgment of the subsistence of the debt. So it is with respect to an infant; he has a moral, though not a legal obligation, to pay the debt, which subsists from the moment

(a) 2 Burr. 1099. (b) 2 Lord Raymond, 1101.

when the debt is incurred, and consequently a promise to pay, if made after he has attained full age, is a binding promise, whether made before or after action commenced, because it revives the original moral obligation, and converts it into a present legal liability. In this view, it seems impossible to distinguish the present from the case of *Yea* v. *Fouraker;* and therefore upon the principle there laid down, that an acknowledgment of the debt after action brought would bar the statute of limitations, the promise relied upon here is a sufficient answer to the plea of infancy.

Brougham and *Starkie*, contrà, were stopped by the Court.

BAYLEY, J.—There is a plain and important distinction between the two cases which the argument for the plaintiff has labored to assimilate. Where the statute of limitations applies, it operates only to extinguish the claim for a pre-existing debt; it allows that the debt has existed, but presumes that it has been discharged; and then the subsequent promise rebuts the presumption of payment, and revives the original debt, without creating any new obligation. But where infancy is pleaded, and proved, there is neither debt nor obligation existing until the party comes of age, because any promise made by him during his infancy is void in law. If, upon arriving at full age, he makes a promise to pay a debt incurred during his infancy, that promise is binding upon him. But why? Because it constitutes a new debt and a new liability, and that debt and liability date their existence from the precise period of the promise only, without reference to the commencement of the action. *Cohen* v. *Armstrong* (a) and *Baylis* v. *Dineley* (b) are authorities to shew that in actions of this kind the replication must aver a promise made before the commencement of the suit, and therefore are strongly in support of the principle I have laid down. I am therefore of opinion that this action is not supported by a promise made after its commencement,

(a) 1 M. and S. 724. (b) 3 Id. 477.

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and that the rule for entering a nonsuit must be made absolute.

HOLROYD, J.—The present case differs essentially from those arising upon the statute of limitations. In the latter there has been an original existing debt, the evidence of which the law presumes to have been lost by lapse of time. Here there never was any legal existing debt, and there was no legal obligation upon the defendant at the moment when the suit was instituted. Where the statute of limitations applies, a new promise revives the original debt ab initio, and so operates equally whether the promise is made before or after the action is commenced. Here the plaintiff had no legal cause of action when he commenced his suit, and therefore had no foundation upon which that suit could rest. The only cause of action he had was a new promise, and not a revival of the old one, and that will not support an action because it was made too late.

LITTLEDALE, J.—The distinction between the two cases is substantial. The defendant, by pleading the statute of limitations and making an acknowledgment, actually admits the existence of the debt, and recognises it as still due when the action was commenced, and for that reason, a promise, whether made before or after action brought, is an answer to the plea. Here it is not so. The contract made by the defendant, being an infant, was not merely voidable, but absolutely void in law, and therefore the promise made after action brought did not shew any legal cause of action to have existed when the action was commenced, for it could not have relation back so as to revive and enforce a contract which was in itself illegal and void.

Rule absolute.

BLAKE *v.* JOSEPH ATTERSOLL.

By the trusts of a marriage settlement a father agreed to settle 10,000*l.* upon his daughter, in trust, to pay the interest to the husband during his life. The father died without ever having paid the principal money to the trustees; and the husband having agreed with the executors to accept 5,000*l.* and an annuity of 125*l.* for life in lieu of the 10,000*l.*:— Held that such annuity did not require enrolment by stat. 53 *G.* 3. c. 111.

THIS was an action of debt upon a bond made in the penal sum of 2,500*l.*, and conditioned for the payment by the defendant and one *John Attersoll*, deceased, to the plaintiff of an annuity of 125*l.* for his life; breach, non-payment of certain arrears of the annuity. The plea craved oyer of the bond and condition, and the condition recited, that the plaintiff having made a marriage settlement upon his wife, the sister of the defendant, her father, *Joseph Attersoll*, deceased, had agreed to secure the sum of 10,000*l.* by assigning fifty dock shares to the trustees under the marriage settlement, the interest of which sum the plaintiff was to receive for his life; that the fifty dock shares never were transferred to the trustees, nor the 10,000*l.* ever raised; that the father, *Joseph Attersoll*, died in 1812, having by his will appointed the defendant and another person his executors; that various doubtful and unsettled claims and demands existed against *Joseph Attersoll*, the deceased, at the time of his death, insomuch that the executors were not then able to adjust the accounts relating to his estate and effects, and could not ascertain whether his estate and effects would be adequate to the liquidation of all his debts and engagements; that it was believed that they could not be administered without the assistance of the Court of Chancery, and therefore it had been proposed between the defendant, the trustees and the executors, for the immediate and final settlement of all claims either upon the executors or the estate of the testator in respect of the 10,000*l.*, that the executors should pay the plaintiff 5,000*l.*, and should by their joint and several bond secure to him an annuity of 125*l.* for his life; that it was agreed that the 5,000*l.* and the annuity should be in full satisfaction of the 10,000*l.* owing from the father's estate to the trustees, and that in consideration thereof the plaintiff had agreed to secure to the trustees

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10,000*l.* mortgage upon freehold estates of his in *Ireland;* that it was further agreed that the 10,000*l.* should be considered as paid and discharged by the executors to the trustees, and that the 10,000*l.* and the interest, secured by the mortgage, should be held by them on the trusts of the settlement. The mortgage deed by the plaintiff was then recited, together with a release from him and the trustees to the executors in respect of the dock shares, the 10,000*l.* and all claims and demands arising out of the marriage settlement. The condition of the bond was for the payment of the annuity of 125*l.* quarterly, and the plea concluded by stating that the bond was executed subsequent to the passing of the 53 *Geo.* 3. c. 141. and that no memorial of the annuity had been enrolled pursuant to that statute. A second plea stated that at the time when the release was given, that release was of the value of 50*l.* and that no memorial had been enrolled. General demurrer to the pleas, and joinder in demurrer.

Jeremy, in support of the demurrer, having briefly argued that this annuity was not within the statute 53 *Geo.* 3. c. 141. and therefore did not require that the memorial should be enrolled, and having cited in support of that argument the case of *Morris* v. *Jones* (*a*), was stopt by the Court.

H. I. Stephen, contrà, was called upon to support the plea. It is due to the defendant to state that his object for prosecuting the present inquiry is to obtain the opinion of the Court, in order to give him a claim for contribution upon the representatives of the other party to the bond. The question before the Court is one of some difficulty, for there are contradictory decisions upon the annuity acts. *Crespigny* v. *Wittenhoom* (*b*) is an authority apparently against the defendant, but upon examination that case will not be found to apply in principle to this. The question there arose upon the 17 *Geo.* 3. c. 26., and it was held that an

(*a*) Ante, vol. iii. 263. (*b*) 4 T. R. 790.

annuity granted upon the consideration of the grantee resigning his trade to the grantor, was not within that statute, and need not be registered. But the reasons given for that holding will not apply to the present case. There the Court inferred from the preamble of the statute, that it related exclusively to annuities granted upon pecuniary considerations, but nothing can be found in the preamble of the 53 G. 3. c. 141. to warrant such an inference; and the language of the second section is materially different from that of the former statute, which does warrant the presumption that the legislature intended to give a more extended operation to the latter. By that section it is required that *pecuniary* considerations for granting annuities shall be enrolled, and the 10th section, the excepting clause, enumerates as exceptions from the application of the act, all annuities given by will, or by marriage settlement, or for the advancement of children, and all *voluntary* annuities granted without regard to pecuniary consideration or *money's worth.* It appears from this clause that the legislature understood annuities granted for other than pecuniary considerations to be within the enacting clause. The Court of Common Pleas have indeed held, in the late case of *James* v. *James* (*a*), that a case, in which the consideration given for the annuity was not pecuniary, was not within the statute, but it is quite clear from the excepting clause that the decision in that case is not law. Why is the enrolment required? In order to give publicity to the proceeding, and thereby prevent those frauds to which secret transactions would be liable. Why is the consideration required to be stated? In order that it may appear whether a fair and adequate consideration was or was not given for the annuity. The only point decided in *Morris* v. *Jones* is that collateral securities need not be enrolled, and that case therefore in no respect governs the present. Then, if there are no authorities in point to bind the Court, this case, upon a liberal construction of the act,

(*a*) 5 J. B. Moore, 479. S. C. 2 B. and B. 702.

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which it ought to receive, because its terms are very general, must be considered as falling within the purview of the statute. The meaning of the term "money's worth," in the excepting clause, can only be that other considerations than those actually pecuniary were included in the act. The 53 *G.* 3. was evidently intended to include some cases which the 17 *G.* 3. did not; and if the present is not one of those cases, it will be difficult to imagine any one that is. Assuming that the decision in *James* v. *James* is law, which is denied, still that differs from the present case; for there the consideration was neither money, nor money's worth, in any sense of those words: here, it is money's worth in the fullest sense; it is wholly of a pecuniary nature; and as such it is within the fair scope and meaning of the statute 53 *G.* 3. c. 141.

BAYLEY, J.—Mr. *Stephen* has presented this case to us in as strong a point of view for the defendant as was possible, but I am perfectly satisfied that the annuity secured by this bond is not such an annuity as is required to be enrolled by the 53 *G.* 3. c. 141. The preamble of the 17 *G.* 3. c. 26. recites that "the pernicious practice of raising money by the *sale* of life annuities hath of late years greatly increased, and is much promoted by the secrecy with which such transactions are conducted," which shews that the only mischief contemplated, and intended to be corrected, was the *sale* of life annuities as a mode of raising money. The preamble of the 53 *G.* 3. c. 141. does not indeed contain equally comprehensive terms, but there are subsequent parts of that statute which serve to shew that the object which the legislature had in view was the same. The sixth section provides "that if any part of the consideration for the *purchase* of any annuity, &c. shall be returned to the person advancing the same, or in case *such* consideration or any part of it shall be paid in notes, if any of the notes shall not be paid when due, &c., or if *such* consideration," &c., then a power

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is given to the Court to cancel the instruments whereby the annuity is secured; and the eighth provides "that all contracts for the *purchase* of any annuity or rent charge, with any person being under the age of twenty-one years, shall be and remain utterly void," &c. The adoption of the word "purchase" in both these instances clearly indicates that the legislature then had the same object in view, and intended to act upon the same principle as before, namely, to put down the system of raising money by the sale of life annuities. It seems to me that the present cannot be considered as the case of the sale of a life annuity. What are the facts disclosed upon the pleadings? The plaintiff having married a daughter of *Attersoll* the elder, it was agreed that certain dock shares should be transferred to trustees, for the purpose of raising 10,000*l.* as a portion for the daughter, the interest of which the plaintiff was to enjoy for his life. Before the dock shares were transferred, *Attersoll* died in embarrassed circumstances, so much so that it was doubtful whether his effects would be adequate to meet his debts. It was then agreed that the executors of *Attersoll* should pay the plaintiff 5,000*l.* down, and secure him an annuity of 125*l.* for his life, instead of the annuity of 250*l.* to which he would have been entitled under the marriage settlement. I think it would be confounding principles to say that this was an annuity such as is contemplated by either of the acts of parliament. There was no "purchase." The grantor did not intend to sell, nor the grantee to buy, the annuity; their joint object was to relieve the estate, and with that view the plaintiff agreed to give up part of the money to which he was entitled under the marriage settlement, and in lieu of it to receive an annual sum, amounting to ten shillings in the pound, upon that which he would otherwise have been entitled to receive, and that annual sum the executors agreed and by their bond covenanted to pay him. This Court has decided in *Crespigny* v. *Wittenhoom* that such an annuity as this does not come within the operation of the 17 *G.* 3. c. 26.,

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and in *Hutton* v. *Lewis* (a) it was also held that "an annuity granted in consideration of the grantee resigning his situation as master of an academy, in favor of the grantor, need not be registered under the 17 G. 3. c. 26., even though, at the time of the grant, the grantee agreed to assign over to the grantor his household furniture, &c. at an appraised value, and to lend a sum of money to the grantor, to be repaid with interest;" for as Lord *Kenyon* there said, "this annuity was not granted in consideration of money paid to the grantor, but of resigning the grantee's situation in favor of the grantor." Now here, there was no money consideration moving to the grantor; he was the executor of an insolvent estate; out of which there was no probability that there would, nor did the agreement between him and the grantee contemplate that there should, arise any surplus which should go to the grantor. The excepting clause in the 53 G. 3. c. 141. has been very forcibly commented on by Mr. *Stephen;* but it seems to me that several of the cases there enumerated, such as annuities granted by wills and by marriage settlements, are not properly within the enacting clause. The second section requires that the pecuniary consideration shall be enrolled according to a form afterwards set out; one column in that form is headed "Consideration, and how paid," and beneath are the words "so much paid in money, so much paid in bank notes, or other notes, or bills of exchange;" clearly shewing that that section was meant to apply only to considerations paid in cash, or in promissory notes, or in bills of exchange. Construing that clause therefore with reference to the tenth, the excepting clause, I am of opinion that the legislature meant to comprehend only those annuities which are bought on the one hand, and sold on the other, for a consideration in money or money's worth, moving from the grantee to the grantor. In this case I think there was no consideration in money or money's worth moving from the grantee to the grantor, and conse-

(a) 5 T. R. 639.

quently that the annuity did not require enrolment, and that the plaintiff is entitled to maintain this action for the arrears owing to him.

HOLROYD, J.—I am also clearly of opinion that this annuity is not within the act. The only consideration is this; the grantee gives up the chance of getting all that was due to him from the estate of the deceased, and in order to avoid certain inconveniences agrees to take a less sum than he was actually entitled to. There was neither money nor money's worth paid for the annuity, nor any intention to make or receive such payment by either of the parties. In addition to the case mentioned by my brother *Bayley*, I think *Horn* v. *Horn* (a) may be mentioned, as an authority for saying that in order to bring an annuity within the act there must be a pecuniary consideration paid and received for it.

LITTLEDALE, J.—It is clear to me that this is not an annuity requiring enrolment within the meaning of either of the statutes. It has been argued that the object of the statutes must be different, because there is a difference in the language of their respective preambles; but they are both made in pari materiâ; the one is a substitution for the other; and upon a comparison of both, taken altogether, it is plain that they were intended to remedy the same evil. Then if the object of both be the same, the preamble of the first may be taken as incorporated in the second, and then, in order to bring an annuity within the latter, there must be an actual sale of it for money, bills, or goods. It is evident from the form of enrolment set out in the second section, that the consideration must be either money, or something easily convertible into money, and the subsequent clause which regulates the charge of brokerage, can only refer to money payments. Here there was no money payment; there was no sale of the annuity for money or money's worth; there was no consideration in money or money's worth

(a) 7 East, 529.

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moving to the grantor; and therefore it is not such an annuity as the law requires to be enrolled.

Judgment for the Plaintiff.

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Sales of goods by auction are within the 17th section of the statute of frauds. Where at a public auction of goods, the conditions of sale were read by the auctioneer before the biddings commenced, but the printed catalogue did not refer to the conditions, nor were they attached to it, and the agent of the defendant was declared the highest bidder for a lot, and the auctioneer put down the price and the name of the agent opposite the lot in the sale catalogue: Held, that this was not a sufficient memorandum in writing of the bargain to satisfy the statute; but if the conditions of sale had been annexed to the catalogue, the putting down the agent's name would have been sufficient to bind his principal.

THIS was an action of special assumpsit brought against the defendant, for not carrying away and paying for a carding engine, purchased by him at a public auction, according to the conditions of sale. The declaration set out the conditions of sale, and stated that in consequence of the defendant's refusing to complete the purchase, the machine was resold at a loss. Plea, the general issue, non assumpsit, and issue thereon. At the trial before *Holroyd*, J. at the *Summer* Assizes for *Lancashire*, 1823, the case was this: The carding engine in question had been put up for sale by public auction together with various other articles belonging to the plaintiff. The conditions of sale were publicly read by the auctioneer before any bidding was made, but the printed catalogue did not refer to them, nor were they attached to it. The carding engine was knocked down at the price of 100 guineas to Mr. *Luke Winterbottom*, as the highest bidder, who bid for it as the agent of the defendant, and the auctioneer inserted his name and that price opposite to the entry of the machine in the catalogue. Two objections were taken for the defendant. First, that the real vendee not being named in the catalogue, but only his agent, there was no memorandum of the bargain *signed by the parties* within the meaning of the 17th section of the statute of frauds, 29 *Car.* 2. c. 3; and second, that the conditions of sale being part of the bargain, and not being attached to the catalogue, the catalogue alone was not a memorandum of the bargain, within the meaning of the

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same section. The first objection was overruled by the learned Judge, but he reserved the second, and the plaintiff had a verdict, with liberty to the defendant to move to enter a nonsuit.

Cross, Serjt. in *Michaelmas* Term last, moved accordingly, and obtained a rule nisi.

J. Williams now shewed cause. The first objection was properly overruled, and will not now be relied upon, for *Saunderson* v. *Jackson* (a), and *Phillimore* v. *Barry* (b) are decisive authorities against it; in the latter of which "Lord *Ellenborough* held that the initials of the defendant's agent (who was the purchaser) written by the auctioneer in the catalogue, coupled with their letter recognising the sale, constituted a sufficient memorandum in writing to satisfy the statute of frauds." The second is a more serious objection; and is one of great and general importance, inasmuch as upon it depends the validity of every sale by public auction. The doctrine of the same learned Judge in in *Hinde* v. *Whitehouse* (c) will be cited in support of this objection, but that does not *decide* even the general question whether sales by auction are, or are not, within the statute; for his lordship there said, "I am not, therefore, prepared to say that sales by auction are not meant to be comprehended within the statute. Nor would I be understood as giving any conclusive opinion to the contrary." Afterwards, indeed, he added, "I am of opinion therefore that the mere writing on the catalogue, not being by any reference incorporated with the conditions of sale, is not a memorandum of a *bargain* under those conditions of sale;" but the case was not decided on that ground, for the judgment of the Court proceeded on the fact that there had been a delivery and acceptance of a part of the goods in the

(a) 2 Bos. & Pul. 238.

(b) 1 Camp. 513. Vide Phillips on Evidence, 3d edit. 370, et seq. 6 East, 307. 15 East, 105. 3 B. & P. 233. 1 N. R. 254. 3 Taunt. 172.

(c) 7 East, 558.

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name of the whole. Neither can the more recent case of *Boydell* v. *Drummond* (a) be treated as an authority upon this point, for that was decided upon another ground, namely, that the contract there "was not a contract which was to be performed within a year, and ought therefore to have been evidenced by writing signed, as required by the statute of frauds." [*Bayley*, J. There are several cases in equity where it has been held that sales by auction of lands are within the statute.] There are such cases, but they apply to sales of lands only. Here the conditions of sale were publicly read before the sale began, and that was a sufficient mode of attaching them to the catalogue. Suppose they had actually been annexed to the catalogue during the early part of the sale, and then had been severed for the purpose of exhibition to a particular person, what difference could there be between a lot sold before and a lot sold after such severance, if the conditions remained in the room, and continued to govern the conduct of the parties? The conditions were expressly referred to by the act of reading them, they were treated by all the parties as governing the sale, they were virtually and in the understanding of all present incorporated with the catalogue, and therefore the signature of one was in effect the signature of both.

Cross, Serjt. (with whom was *Starkie*,) contrà. The plaintiff must prove a complete contract entered into by the defendant or his agent; and if he fails in that, his action fails also. It is too late now to contend that sales by auction of goods are not within the statute. *Simon* v. *Motivos* (b) is the only authority for that argument, and that has been long since and frequently overruled. Besides the reason given by Lord *Mansfield* for that decision, that "the solemnity of that kind of sale precludes all perjury as to the fact itself of sale," does not apply to this case, for what solemnity is there in a transaction like the present? There is no evi-

(a) 11 East, 142. (b) 3 Burr. 1921. S. C. 1 Sir W. Bl.

dence in this case to shew that either the defendant or his agent heard the conditions of sale read, or even knew of their existence, much less that he gave his assent to them. They were not in any way referred to by the catalogue, nor were they either actually or virtually attached to or made part of it. Therefore the signature of the catalogue was not a note in writing of the bargain within the letter or the spirit of the statute. The present question was expressly decided in *Hinde* v. *Whitehouse*, and in point of principle the two cases cannot be distinguished. (Here the Court stopped him.)

BAYLEY, J.—There are many cases in which it has been held that in sales by auction of lands the auctioneer is the agent both of the seller and the purchaser, and that contracts so made are within the provisions of the statute of frauds, because the auctioneer signs them as the agent of both. *White* v. *Proctor* (*a*), *Kemeys* v. *Proctor* (*b*), *Walker* v. *Constable* (*c*), and *Emmerson* v. *Heelis* (*d*). The 17th section of the statute, which respects the sale of goods, is substantially the same as the 4th section, which respects the sale of lands, the only variation being that the former contains the word "bargain," and the latter the word "agreement." By the word "bargain" the legislature intended to express the terms upon which the parties contract, and *Saunderson* v. *Jackson* has decided, that in order to satisfy the statute there must be the signature of the parties or their agent either to some written document which itself contains the terms of the contract, or is connected with some other document containing them. Then in *Hinde* v. *Whitehouse*, Lord *Ellenborough*, after deliberation, expressed his opinion, that a minute of the purchaser's name made upon the catalogue of sale by the auctioneer, that catalogue not being annexed to the conditions of sale, nor having any internal reference to them, was not a memoran-

(*a*) 4 Taunt. 209.
(*b*) 3 Ves. & Beam. 57.
(*c*) 1 Bos. & Pul. 306.
(*d*) 2 Taunt. 38.

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dum of the bargain within the meaning of the statute. Here the catalogue was not annexed to the conditions of sale, nor had it any internal reference to them, and when the machine was put up for sale no statement was made of the terms or conditions upon which it was meant to be sold. All the mischief, therefore, which the legislature intended to prevent, might have occurred in a case like this, for there would be abundant room for fraud and perjury in giving parol testimony of the nature and extent of the conditions of sale. I am therefore of opinion that there was no memorandum in writing, signed by the parties, of the terms of the contract made between them, and consequently that the case is within the 17th section of the statute of frauds, and the action not maintainable. The rule for entering a nonsuit must therefore be made absolute.

HOLROYD, J.—Two objections were raised at the trial of this cause. The first was, that the defendant's name was not written down by the auctioneer, but as it was proved that *Winterbottom* was the authorised agent of the defendant, and as his name was written down, I thought there was no weight in that objection, and I am of the same opinion still. The second was, that the signature was not attached to the conditions of sale, and that point I reserved. Upon the authority of *Hinde* v. *Whitehouse* I am now quite satisfied, that sales by auction of goods are within the provisions of the statute of frauds, and that there has not been in this case a signature of a memorandum of a bargain such as is required by the 17th section of that act. It is impossible to call that a memorandum of a bargain, which does not contain the terms of it, and here the document which was signed did not contain the conditions of sale, which were the terms of the bargain. It has been argued that the conditions of sale having been publicly read, and having remained in the room all the time, were virtually annexed to the catalogue, but I cannot assent to that proposition. I think it

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was necessary that they should be either actually annexed to the catalogue, or plainly referred to by it, neither of which was the fact here; and I should say that signatures affixed to the catalogue, after the conditions had been severed from from it, in the course of the sale, would not be available to satisfy the statute. I therefore concur in thinking that this case is within both the words and the mischief of the statute, and that the defendant is entitled to judgment of nonsuit.

Rule absolute (*a*).

(*a*) *Littledale*, J. was sitting at the Old Bailey.

JOHN MILLS *v.* JOHN FUNNELL.

By an act for improving the town of *Brighton*, and preserving the adjacent coast from the incursions of the sea, the commissioners therein named were empowered to collect any rate or duty which they should think fit to order, not exceeding the sum of 3s. for *every chaldron* of coals landed on the beach, or in any other manner brought or delivered within the town. Where a declaration in debt for duties, under this statute, alleged, that defendant, on divers days and times between, &c. brought and delivered within the town divers large quantities, in the whole amounting to a large quantity, to wit, 68 chaldrons and four bushels of coals, in quantities on each of the said days and times less than one chaldron: Held, that the duty attached, though the defendant did not bring into the town at any one time a quantity amounting to a chaldron: Held also, that plaintiff might take judgment for the 68 chaldrons, and enter a remittitur for the residue.

DEBT. The declaration stated that plaintiff, treasurer to the commissioners acting under a certain act of parliament passed in the 50th *Geo.* 3. entitled, "An Act to repeal an Act made in the 13th year of his present Majesty, for paving, lighting, and cleansing the town of *Brighton*, in the county of *Sussex*, and removing and preventing nuisances and annoyances therein; for regulating the market, for building and repairing groyns, to render the coast safe and commodious for landing coal and culm, and laying a duty thereon; and for making other provisions in lieu thereof, and for regulating weights and measures and building a town hall;" complained of defendant being, &c. of a plea, that he render to plaintiff (as such treasurer) £20. 8s. 4*d*. which he owed, &c.; for that whereas, after the passing of the act, to wit, on the 8th *May*, 1822, at, &c. at a certain meeting of the commissioners then and there duly held in pursuance of the

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said act; by which said order the said commissioners then and there duly ordered and directed that from the 1st day of *May* then instant, for one year, a rate or duty should be paid of three shillings per chaldron on all sea coal, culm, or other coal, which should be brought or delivered within the limits of the said town. The declaration then stated, that afterwards, to wit, on the 30th *April*, 1823, at a certain other meeting of the said commissioners, then and there duly held in pursuance of the said act, the said commissioners duly made a certain order in writing, in pursuance of the said act, by which order the said commissioners then and there ordered and directed, that from the 1st *May* then next, for one year, a rate or duty should be paid of three shillings per chaldron on all sea coal, culm, or other coal, which should be brought or delivered within the limits of the said town; of which said several premises, defendant afterwards, to wit, on the day and year last aforesaid, at, &c. had notice; and plaintiff, treasurer as aforesaid, further saith, that the said defendant, after the making of the said first mentioned order, to wit, on the 10th *May*, 1822, aforesaid, and on divers other days and times between that day and the day of exhibiting this bill, to wit, at, &c. brought and delivered within the limits of the said town, divers large quantities, in the whole amounting to a large quantity, to wit, sixty-eight chaldrons and four bushels of coals, in quantities on each of the said days and times less than one chaldron, by means whereof, and according to the true intent and meaning of the said act, defendant then and there became liable to pay, and ought to have paid to the said commissioners or to their collector for the time being, divers sums of money, as and for the rates and duties for and in respect of such coals, so brought and delivered by defendant within the limits of the said town, as aforesaid, amounting in the whole to a large sum of money, to wit, the sum of 10*l*. 4*s*. 4*d*., being at and after the rate of three shillings for each chaldron of the same coals, whereby and by force of the said statute an action hath accrued to plaintiff, as

treasurer of the said commissioners as aforesaid, to demand and have of and from defendant the said sum of 10*l.* 4*s.* 4*d.* parcel of the said sum above demanded. Second count was more general.—Plea, Nil debet, and issue thereon. At the trial before Mr. Serjeant *Onslow*, at the *Summer* assizes for *Sussex* in 1823, the jury found a verdict for the plaintiff, on the first count, for 7*l.* 10*s.*, and they were discharged from giving a verdict on the second. In *Michaelmas* Term last, *Taddy*, Serjt. obtained a rule nisi to arrest the judgment on three grounds: First, that the first order of the commissioners set out in the declaration was invalid, inasmuch as it had a retrospective operation; second, that the duty being claimed in respect of sixty-eight chaldrons and four bushels, as an entire sum, the count could not be supported, inasmuch as no duty was payable in respect of the fractional part of a chaldron; and third, that no duty was recoverable under the act of parliament in question, in respect of coals brought into the town of *Brighton* in less quantities than a chaldron at a time (*a*).

(*a*) The third point, and which was the most material, arose upon the following section of the 50 *Geo.* 3.—

"And whereas, by the said recited act (13 *G.* 3. s. 107.) it was enacted, that the commissioners named and appointed in and by the same, should be trustees for repairing, improving, maintaining, and preserving the groyns that had been erected for the preservation of the said town, and erecting and building any new ones, or such other works as should appear to them most proper for that purpose; and the sum of sixpence for every chaldron of sea coal, culm, and other coal, that should be landed on the beach of the coast of the said town, was directed to be paid to the said commissioners; and the said commissioners were thereby empowered to borrow any sum of money, not exceeding the sum of £1500 upon the security of the said duty: And whereas the said commissioners did accordingly borrow the sum of £1500 upon the credit of the said duty, great part of which is now due and owing: And whereas, since the passing of the said act, great encroachments have been made by the sea upon the coast adjoining the said town, and the said duty hath been found inadequate to the charges and expenses of erecting new groyns, walls, and other fences, or works, which are now necessary for the safety and protection of the said town against such encroachments; be it therefore enacted, that from and after the passing of this act, it shall and may be lawful to and for the said commissioners, and they are

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Marryat, *Gurney*, and *Long*, now shewed cause. As to the first objection, that the order set out in the first count of the declaration is retrospective, it will not avail the defendant; because, supposing the order to be retrospective as to the by-gone time, still it will comprehend the quantity of coals brought into the town by the defendant between the 10th of *May* and the day of exhibiting the bill. Then, secondly, the circumstance of the duty being claimed in respect of sixty-eight chaldrons and four bushels cannot make any difference, because the quantity is laid under a videlicet. But, thirdly, (which is the main and important point intended to be raised on the other side,) it is obvious, that the duty is payable upon aggregate quantities of coals amounting to a chaldron, although they be brought into the town in quantities less than a chaldron. Unless this construction be put upon the statute, it will be in the power of the coal-dealer, or merchant, completely to evade the duty, by taking care never to bring his coals into the town in quantities amounting to a chaldron at any one time. By the 107th section of the statute, the commissioners have power to raise a duty, not exceeding three shillings, upon *every chaldron* of coals brought into the town. This surely, of necessity, must give the power of raising, after that rate, for any less quantity than a chaldron which may be brought

hereby authorized and required, from time to time, as to them shall seem necessary and expedient, to repair, improve, and maintain, add to, alter, or remove, the groyns, walls, or other fences or works already erected and built, or to be made, erected, and built, or to cause to be made, erected, and built, any new groyns, or other works whatsoever, which may appear to them necessary, requisite, or proper for the safety of the said town, or any part thereof, or any part of the beach or shore within the said town; and that from and after the passing of this act, there shall be paid to the said commissioners, or to their collector or collectors, or to such person or persons as they shall from time to time appoint to collect and receive the same, any rate or duty which the said commissioners shall think fit to order and direct, not exceeding the sum of three shillings for every chaldron of sea coal, culm, or other coal, which shall or may be landed on the beach of the said town, or in any other manner by land carriage, or otherwise brought or delivered within the limits of the said town."

in. If this be not the true construction of the statute, all that the merchant has to do is to land his coals at *Shoreham*, or deposit them in a yard just out of the parish of *Brighton*, and send them into the town in quantities of 35¼ bushels, and so evade the duty. It is impossible, however, that the statute can receive so unreasonable a construction. This statute is not only remedial, but it is conservative. The object of it is to preserve the town of *Brighton* against the inroads of the sea, by raising a duty upon coals brought into the town; but if it is to receive the narrow construction contended for on the other side, that object will be completely defeated. It is to be observed, that the 59 *Geo.* 3. c. 52. s. 13. under which the government coast coal duties are collected, is worded in like manner with the *Brighton* act, and under that statute the duties have been invariably collected on fractional parts of a chaldron. If there could be any doubt upon the construction of the act, still it being remedial as well as conservative, it ought to be construed liberally so as to effect its obvious intention.

Taddy, Serjt. (with whom was *Chitty*,) in support of the rule, contended, first, that the order first set out in the declaration, being manifestly retrospective, was void altogether, and could not operate so as to render coals brought into the town before the day of its date, liable to the duty. On this ground, the first count of the declaration is clearly bad. Then, secondly, the duty being claimed in respect of an *entire* quantity of sixty-eight chaldrons *and four bushels* of coals, it is impossible to sustain the first count, because if the construction be right, that the duty is not payable upon the fractional part of a chaldron, it is clear that no duty is payable in respect of the four bushels; and an entire sum being claimed in respect of the whole quantity, the allegation is not divisible. There is nothing upon the face of the declaration to shew that any one *entire* chaldron was brought into the town by the defendant. On the contrary, it is consistent with the mode in which the declaration is

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framed, that all the coals were brought into the town in less quantities than a chaldron. The quantity is by no means immaterial in the view which is to be taken of the statute. Undoubtedly the videlicet may be rejected or adopted, but it must be rejected or adopted in toto. The plaintiff cannot take his verdict for the duty on the sixty-eight chaldrons, and reject the four bushels. [*Holroyd*, J. That objection will not go to the whole quantity. The plaintiff may sustain his claim to a duty on the sixty-eight chaldrons, although not on the odd four bushels. He may enter a remittitur in respect of the fractional quantity.] Still, it is submitted, that the Court cannot reject the allegation as to the four bushels. [*Bayley*, J. In *Ingledew* v. *Cripps* (a) the plaintiff declared in debt on a deed whereby defendant covenanted to pay the plaintiff 35*l. per hundred* for *every hundred* loads of wood in such a place, and that he delivered so many hundred, *and one half*, which came to 182*l.* 10*s.* and it was held, on demurrer, that the plaintiff might enter a remittitur for the half hundred, and have judgment for the rest.] It is clear, however, upon the third, which is the main point, that the duty does not attach upon coals brought into the town in less quantities than a chaldron. The provision of the statute is, that the commissioners shall collect any rate or duty not exceeding the sum of three shillings for *every chaldron* of sea coal, &c. The words are "every chaldron," and not upon quantities *amounting* to a chaldron, secundum rationem, which would have removed all difficulty upon the subject. There is nothing in this statute which authorizes the duty upon an aliquot portion of a chaldron. It obviously means that the duty shall be payable upon coals when they are brought into the town in the quantity of a chaldron, or more, but not where the quantity is less. According to the argument on the other side, the duty would be payable upon every fraction of a chaldron, however minute. Such a construction, however, would be productive of the greatest inconvenience, and indeed it would

(a) 2 Ld. Raym. 814. S. C. Far. 87. See *Holt*, 200. and 2 Salk. 658.

be impracticable to carry the act into effect to that extent. Here, the duty never attached, because all the coals, in respect of which the duty is now claimed, were brought into the town in less quantities than a chaldron. The case of *Ingledew* v. *Cripps*, is an authority to shew, at all events, that under a covenant to pay so much per hundred for every hundred loads of wood, the defendant would not be liable to pay for a less quantity than a hundred. On the same principle, the duty in this case could not attach upon any quantity less than a chaldron. The effect of this statute being to impose a tax upon the public, it ought to be construed most strictly in favor of the public, unless there are clear and express words which remove all doubt. *Ramsden* v. *Gibbs* (a). Here there is considerable doubt, and therefore it ought to be construed in favor of the defendant.

Bayley, J.—I am of opinion that the rule for arresting the judgment must be discharged. If the first order of the commissioners had been retrospective, I should have thought it was void as to the by-gone time, but still good as to the residue; but looking to the declaration, it appears to me, to apply only to such coals as *should* be brought into the town, that is, as should *thereafter* be brought in. That objection being thus disposed of, then the question is, not whether this act of parliament would attach on less than a chaldron of coals, but whether it will be prevented from attaching, because much more coals than a chaldron in the aggregate were brought into the town by the defendant during the time alleged in the declaration. It is urged, on the part of the defendant, that the object of this act of parliament being to impose a tax on the public, it ought to be construed strictly; but, on the other hand, it is said to be both remedial and conservative. It appears, undoubtedly, to have passed in furtherance of the 12 *Geo*. 3. c. 34, one of the objects of which was, to raise a sum of money for the purpose of making the adjacent coast safe and secure for

(a) Ante, vol. ii. 629.

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the landing of coals; and the legislature contemplated that the inhabitants of the town of *Brighton* would derive great benefit from having their coals landed on the coast. Then the 53 *Geo.* 3. passed, for the purpose of rendering the former act more efficient. It was discovered perhaps, by experience, that although some coals were landed on the coast, yet, for the purpose of evading the duty, or from some other motive, coals were brought by land into the town, which did not pay duty, and therefore the legislature thought it was desirable that coals brought by land should be equally subjected to a duty with those brought by sea; for otherwise there might be no coals whatever brought by sea, and then the expense of making and repairing groyns, and effecting other improvements on the coast, might be uselessly incurred; provision was therefore made that the commissioners should collect and receive any rate or duty "not exceeding the sum of three shillings for *every chaldron* of sea coal, culm, or other coal, which shall or may be landed on the beach of the said town, or in any other manner, by land carriage or otherwise, brought or delivered within the limits of the said town." The defendant in this case has brought sixty-eight chaldrons into the town; but it is said he is not liable to pay any duty in respect of that quantity, inasmuch as he did not bring coals into the town in quantities of one chaldron each time, and never brought more than half a chaldron, or three quarters of a chaldron, each time. The words of the act are, "that the duty shall be payable *for every* chaldron," without any distinction as to the quantities in which the coals are brought; and the good sense of the act is, that the duty shall be imposed upon every chaldron of coal, whether they are brought in large or small quantities into the town. If this construction were not put upon the statute, the necessary effect would be, that the duty might always be evaded, and the object of the legislature defeated, by persons taking care never to bring into the town at any one time so much as a chaldron. It was contended, however, from the manner in which the act is

worded, that we are driven to the necessity, whether the duty would attach to quantities less than a chaldron or not, of holding, that this declaration cannot be sustained, inasmuch as the allegation of quantity is stated under a videlicet, and as it must be adopted or rejected in toto, the plaintiff is not entitled to recover. Now it is not necessary to decide, whether or not any duty is payable in respect of the four bushels, or for any fractional part of a chaldron; for the case of *Ingledew* v. *Cripps* is an authority to shew that the plaintiff is entitled to judgment for the duty in respect of the sixty-eight chaldrons, and may enter a remittitur as to the four bushels. The plaintiff was not bound to prove the whole quantity laid. Here, at all events, the plaintiff is entitled to enter his judgment for the sixty-eight chaldrons, and therefore there is an end to the objection upon that ground. It appears to me, therefore, that there is no pretence for arresting the judgment, and that the rule must be discharged.

HOLROYD, J.—I am of the same opinion. As to the objection, that the first order is retrospective and therefore wholly void, I think it cannot be supported; for assuming the order to be retrospective, still, I think, there would be great difficulty in maintaining that it was void in toto. It appears to me, however, that the order is not retrospective. It is true that it speaks of a day past, namely, the 1st *May* then instant, the order having been made on the 8th *May*, but that is only with reference to the calculation of time during which the order is to continue in force. It is an order for imposing a duty of three shillings per chaldron, which is to be paid, that is, in future, upon all sea coal, &c. which should be brought or delivered within the limits of the said town. Therefore, it is in effect no more than this, that the duty shall be paid for every chaldron of sea coal, culm, and other coal, which shall be brought within the limits of the town from the 1st of *May* last until and upon the 1st *May* then next. Then as to the objection, that the duty

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does not become payable on any quantity of coals short of a chaldron, although at different times more than a chaldron should be brought and delivered within the town, I think that is equally untenable. It is not necessary to determine whether the duty does attach upon a quantity less than a chaldron, supposing more than a chaldron shall not be brought into the town. It appears to me, however, that the affirmative of that proposition could not be made out in this case, considering the terms in which the order set out is worded, and that the duty would not attach upon a quantity less than a chaldron. But it appears to me, that under the act of parliament the duty would attach, provided there is not merely at any one time, but at different times, coals to the amount of a chaldron, brought and delivered within the town. The 107th section empowers the commissioners to impose the duty upon *every chaldron* of coals brought or delivered within the limits of the town. It does not say, every chaldron brought and delivered *at one time*, and therefore if the quantity of a chaldron is delivered, though in quantities less than a chaldron at a time, it would come within the words of this act of parliament. Unless, therefore, there was something to shew that the whole of these coals were not delivered at the same time, we ought to give full effect to the words of the statute. But then it is said, that supposing the duty is to attach upon the full quantity of a given number of chaldrons, yet from the manner in which this declaration is framed, the judgment on the first count must be arrested; because the plaintiff claims a duty in respect of sixty-eight chaldrons *and four bushels*, and, therefore, inasmuch as the duty does not attach upon the broken quantity, nothing can be claimed upon the larger quantity. I think, however, that the case of *Ingledew* v. *Cripps*, which my brother *Bayley* has cited, is an answer to that objection, and shews that the plaintiff may enter a remittitur as to the four bushels, and have judgment for the sixty-eight chaldrons. The principle of that case is also

laid down in Saunders, 286. I am therefore of opinion that the rule must be discharged.

LITTLEDALE, J.—I also think that there is no ground for arresting the judgment in this case. First, assuming that the order made by the commissioners is retrospective, still it would not be bad in toto. The commissioners, certainly, never meant to make it retrospective. The year mentioned in the order is merely to reckon from the first of *May*, or to the end of a year calculated from that time. Admitting it, however, to be retrospective, still it would be good in part, though bad as to the rest. It is clearly divisible. Then as to the more important question, it appears to me, that the duty is payable under this act for every chaldron of coals brought within the limits of the town, whether they be brought in different parcels containing a less quantity than a chaldron or not. We are to look to the intention of the legislature in passing this act; and that is to be collected, not from the single clause in question, but from other parts of the act, and the whole is to be construed with reference to the object which the legislature had in contemplation. That object was, to raise a sufficient sum of money to defray the expense of protecting the inhabitants of *Brighton* from the incursions of the sea, by the erection of groyns, walls, or other fences. This object would be completely defeated, if we were to hold that the duty was not payable in respect of coals brought into the town in parcels containing a less quantity than a chaldron. Construing the enacting clause, therefore, with reference to the object of the legislature, we are bound to hold that the duty is payable upon every chaldron of coals, though they be brought into the town in separate parcels, containing a less quantity than a chaldron. This is not like a matter of contract, where the intention of the parties is to be collected from the terms of their contract; but this question arises upon the construction of an act of parliament, in which the intention of the legislature is to be considered. The construction

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which we now are putting on the statute, is that which is given to acts of parliament for protecting the general revenue of the kingdom. For instance, by the 59 *Geo.* 3. c. 52. s. 12. a certain duty is imposed upon every hundred pounds weight of cotton imported into this kingdom. Could it be contended that no duty would be payable upon a quantity of wool exceeding one hundred pounds weight, because the whole happened to be imported in different ships, each ship containing less than one hundred pounds weight? Surely not. The same rule of construction must be applied to this act. Then, lastly, as to the objection, that the quantity here is stated under a scilicet, I think it is not tenable, for the reasons stated by the Court. The authorities cited by my learned brothers are a complete answer to the objection. If this had been an entire contract, it certainly would not be divisible, according to the Countess of *Plymouth* v. *Throgmorton* (*a*); but under a videlicet, it is a clear rule that you need not prove the whole quantity laid, but may recover pro ratâ. There is, therefore, no ground for arresting the judgment.

Rule discharged.

(*a*) 1 Salk. 65.

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Where the issue in trespass, quare clausum fregit, was, whether "the close in which, &c." was a certain close known by the name of *B.* and that the same close, for thirty years last past, and upwards, had been separate from a certain common; and the Jury found, that part of *B.* had been inclosed within thirty years, and that the alleged trespass had been committed in the inclosed part only:—Held, upon this finding, that the defendant was entitled to the verdict.

TRESPASS for breaking and entering certain closes of the plaintiff, situate in the parish of *Frentishoe* in the county of *Devon*, and prostrating and destroying the hedges and fences thereof. Pleas, first, the general issue, not guilty; second, that one *E. Fosse* being seised in her demesne as of fee of a messuage and land with the appurtenances, situate

in the parish of *Frentishoe*, was entitled by prescription for and in respect of the said messuage and land to a right of common of pasture throughout a certain down or common called *Frentishoe Common*, whereof the said closes in which, &c. until the wrongful separation and inclosure thereof thereinafter mentioned were parcels, for all commonable cattle levant and couchant; that *E. Fosse* had demised the said messuage and land, with the appurtenances, to defendant for a term not yet expired; that defendant had entered upon the demised premises; and that he committed the said supposed trespasses, as he lawfully might, because the said closes in which, &c. at the said several times when, &c. were wrongfully inclosed, separated and divided from the residue of the said down or common by means of the hedges and fences in the said declaration mentioned, so that defendant was prevented from exercising his said right of common of pasture; wherefore, &c. Replication, as to the plea of not guilty; issue thereon; as to the trespasses committed in one of the closes, nolle prosequi; and as to the trespasses committed in the other close, that the said last mentioned close in the said declaration mentioned, *in which, &c.* at the said several times when, &c. was and still is a certain close known by the name of *Burgey Cleave Garden;* that the same close in which, &c. continually for the space of thirty years last past and upwards, has been separated, divided, and inclosed from the said down or common called *Frentishoe Common*, and occupied and enjoyed during all that time in severalty and adversely to the said *E. Fosse*, and to all those whose estate she had in the messuage and land with the appurtenances in that plea mentioned, and to her, and their tenants and farmers, occupiers of the said messuage and land, with the appurtenances, and to all persons claiming under them, and without the exercise and enjoyment during all that time of the said supposed right of common of pasture in that plea mentioned by the said *E. Fosse*, or those under whom she claims title to the said messuage and land, with the appurtenances, her or their tenants or farmers, or

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any of them, for or relating to the said supposed right of common of pasture. Rejoinder, that the said last mentioned close in which, &c., has not been and is not occupied or enjoyed during the time in the said replication mentioned in severalty or adversely to the said *E. Fosse*, and to all those whose estate she had and has in the said messuage and land, with the appurtenances, in that plea mentioned, and to her and their tenants and farmers, occupiers of the said messuage and land, with the appurtenances, and to all persons claiming by, from, or under her, them, or any of them, without the exercise or enjoyment during that time of the said right of common of pasture in that plea mentioned, by the said *E. Fosse* or those under whom she claims title to the said messuage and land, in modo et formâ, &c. At the trial before *Burrough*, J. at the *Devonshire Summer* Assizes, 1823, it appeared in evidence that part of the land comprised in *Burgey Cleave Garden* had been inclosed and held in severalty for more than thirty years, but as to the period during which the rest of it had been inclosed, the evidence was contradictory. The learned Judge told the jury that upon these pleadings the defendant would be entitled to a verdict, if they were of opinion that the trespass had been committed exclusively in that part of the garden which had not been inclosed thirty years; leaving it to them as questions of fact upon the evidence, whether any part had been inclosed within thirty years, and whether the trespass had been committed exclusively on such part. The Jury found that part of the garden had been inclosed within thirty years, and that the trespass had been committed exclusively on that part. A verdict was therefore entered for the defendant.

C. F. Williams, in *Michaelmas* Term last, obtained a rule nisi for setting aside the verdict for the defendant, and entering a verdict for the plaintiff.

E. Lawes, on shewing cause now, was stopt by the Court.

C. F. Williams and *Manning*, in support of the rule. There are three objections to this verdict. First, there was no evidence to warrant the jury in finding that the trespass was committed on a part inclosed within thirty years; second, the jury should have been so directed; and third, in whichever part the trespass was committed, the plaintiff was entitled to a verdict upon these particular pleadings, because he had sufficiently made out the issue to be tried, by shewing that some part of *Burgey Cleave Garden* had been held adversely and in severalty for thirty years. The last is the most important point, and involves the other two. The issue was whether *Burgey Cleave Garden* had been inclosed and held in severalty thirty years: the evidence was that a part of *Burgey Cleave Garden* had been inclosed and held in severalty thirty years, and that such part was generally known by the name of *Burgey Cleave Garden*, without any qualification or limit. That issue therefore was proved in terms, and it was for the defendant to allege and prove that there was another *Burgey Cleave Garden*, which had not been inclosed thirty years, and upon which the trespass had been committed. It was indeed held in *Hawke* v. *Bacon* (*a*) that if the plaintiff avers that a particular close has been separated from a common and inclosed for more than twenty years, it is incumbent upon him to prove that the whole of that close has been so separated and inclosed, and therefore that after a plea of liberum tenementum, he must new assign. But the ground upon which the Court decided that case was, that "it did not differ from the common case of pleading liberum tenementum, where, if the defendant proves that he has a single acre in the vill, the issue is with him, whatever quantity of land the plaintiff may have there, and if the plaintiff had meant to dispute the particular spot, he should have new assigned." But that decision has been expressly overruled by this Court in *Cocker* v. *Crompton* (*b*), where it was held that "where plaintiff in trespass quare clausum fregit begins by naming his own close, it is not

(*a*) 2 Taunt. 156. (*b*) Ante, Vol. ii. 719.

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necessary for him to new assign after a plea of liberum tenementum;" and in which *Abbott*, C. J. said, "When the plaintiff in this case has proved a trespass in his own close of a particular name, it is no answer for the defendant to say that he has a close of the same name. In such an issue the burthen of proof is on the defendant, for his plea "that *the said close*, &c. is his soil and freehold," is disproved by the plaintiff's evidence, and is in effect an admission of the truth of the plaintiff's averment." So in *Stevens* v. *Whistler* (a) it was held that "where the plaintiff had lands abutting on one side of a public highway called *Shepherd's Lane*, (which is primâ facie evidence that half of the lane was his soil and freehold,) he may declare generally for a trespass in his close called *Shepherd's Lane*; and the defendant must plead soil and freehold in another, in order to drive the plaintiff to new assign the trespass complained of in the part of the lane which was his exclusive property." Upon these authorities it seems clear that on these pleadings the plaintiff was entitled to a verdict.

Abbott, C. J.—This rule must be discharged. It is perfectly clear, both upon the evidence and the finding of the jury, that the plaintiff cannot be entitled to a verdict, unless we can say that the fact of any part of the garden being inclosed within thirty years will, under the peculiar form of this issue, entitle him to a verdict, even though the trespass had not been committed on that part. *Cocker* v. *Crompton* is very distinguishable from the present case. There the plaintiff declared for breaking and entering his close called the *Homeyard*; the defendant pleaded that the said close called the *Homeyard* in which, &c. was his soil and freehold: and thereupon issue was joined. Therefore the question in issue there was, whether the close described by the plaintiff as *his* close called the *Homeyard*, was the freehold of the defendant; and the Court very rightly held that the plaintiff having proved a trespass committed in a close in his posses-

(a) 11 East, 51.

sion called the *Homeyard*, had entitled himself to a verdict, although the defendant had another close in the same parish called by the same name. But it does not therefore follow that the plaintiff in this case has entitled himself to a verdict upon these pleadings by proving a trespass in a part of *Burgey Cleave Garden*, which had been inclosed and held in severalty thirty years; and I am clearly of opinion that he has not. The issue taken upon the replication is "that the close in the declaration mentioned, in which, &c. is a certain close known by the name of *Burgey Cleave Garden*, and that the same close for thirty years last past and upwards had been separated from the common." Now by the words, "the close in the declaration mentioned in which, &c.," the allegation is confined to the particular spot on which the trespass was committed, and it became a question of fact for the jury whether that part of *Burgey Cleave Garden* on which the trespass was committed, had been inclosed and held in severalty thirty years. That question was left to the jury, and they have answered it, in my opinion, very properly, in the negative. The result therefore is, that the spot on which the trespass was committed, has not been inclosed and held in severalty during the period mentioned in the replication, and consequently that on this issue the defendant is entitled to a verdict.

BAYLEY, J.—It is clear upon the evidence that the land constituting *Burgey Cleave Garden* had been inclosed at different periods, part of it more than thirty years, and part of it less than that time. The whole of it, however, was known by the general name of *Burgey Cleave Garden*, and if there had been evidence to shew that the part upon which the trespass was committed had been inclosed thirty years, the plaintiff would on these pleadings have been entitled to a verdict. But there was no such evidence; on the contrary, we have the concurrent opinion of the judge and the jury, that the part on which the trespass was committed had been inclosed within thirty years. The only question

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in issue was, whether "the close in the declaration mentioned in which, &c.," had or had not been "separated from the common for thirty years:" the jury have found that it had not, and it is impossible for us to disturb that finding.

HOLROYD, J.—I am also of opinion that there is no ground for disturbing this verdict. The evidence and the finding of the jury are perfectly consistent, and it is plain upon both, that the trespass was committed on that portion of *Burgey Cleave Garden* which had been inclosed less than thirty years. Upon the merits, therefore, the defendant is entitled to a verdict, unless we can say that he is debarred of it by the peculiar frame of the pleadings. Now the allegation in the replication, upon which the only issue in the cause was raised, is, that the close in which, &c. was a close known by the name of *Burgey Cleave Garden*. That may be considered either as an entire, or a divisible allegation; that is, either as including the whole of *Burgey Cleave Garden*, or as confined to that part of *Burgey Cleave Garden* upon which the trespass was committed. At all events it must be considered as including the spot upon which the trespass was committed, for otherwise the replication would be clearly bad. Then, if it is an entire allegation, the plaintiff has alleged, and of course was bound to prove, that the whole of *Burgey Cleave Garden* had been inclosed more than thirty years, upon which issue the fact is against him. If it is a divisible allegation, it becomes a question of fact, whether the part on which the trespass was committed had been inclosed more than thirty years, and that question the jury have decided against the plaintiff also. It seems to me that it ought to be treated as a divisible allegation; and I am of opinion that the jury have done right in finding their verdict for the defendant on that issue. In strict practice, perhaps, the plaintiff was entitled to a verdict upon the general issue, but that would have been useless to him, because as the special plea is an answer to the action, the defendant would still be

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entitled to judgment upon the whole record. Considering the allegation as entire the proper finding would have been, that part of *Burgey Cleave Garden* had not been inclosed thirty years, and that the trespass was committed on that part, and then the plaintiff would have had a verdict upon the general issue, and the defendant would have had judgment non obstante veredicto. But, upon the whole, I am satisfied that the verdict for the defendant was correct, upon the ground that the part of *Burgey Cleave Garden* upon which the trespass was committed had not been inclosed thirty years.

Rule discharged (a).

(a) *Littledale*, J. was sitting at Nisi Prius for the Chief Justice.

O'BRIEN v. SAXON.

To an action for maliciously suing out a commission of bankrupt against plaintiff, the defendant pleaded that plaintiff, being a dealer and chapman, and being indebted to the defendant in the sum of 100*l*. became and was a bankrupt within the meaning of the statutes concerning bankrupts, wherefore defendant sued out the commission in the declaration mentioned. The plaintiff replied that the defendant, of his own wrong, &c. committed the grievances mentioned in the declaration. On demurrer that the plaintiff by this replication, had attempted to put in issue three distinct allegations, viz. the trading, the bankruptcy, and the petitioning creditor's debt: Held, that the replication was sufficient, the plea of bankruptcy being pleaded only as matter of excuse.

THIS was an action for maliciously, and without any reasonable or probable cause, suing out a commission of bankrupt against the plaintiff. The defendant pleaded, that before the suing out of the commission, to wit, on &c. at &c. the plaintiff, being a dealer and chapman, and seeking his trade and living by buying and selling, and being indebted to defendant in the sum of £100 and upwards, became and was a bankrupt, within the meaning of the several statutes then and still in force concerning bankrupts, or some or one of them, wherefore defendant sued out the commission of bankrupt mentioned in the declaration. Replication de injuriâ suâ propriâ absque ullâ tali causâ. Demurrer, that by this replication, plaintiff attempts to put in

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issue three distinct allegations contained in the plea, namely, the plaintiff's trading, his bankruptcy, and the petitioning creditor's debt. Joinder in demurrer.

Manning, in support of the demurrer. The question intended to be raised on these pleadings is, whether the plaintiff's replication is not too general for putting in issue three things, which ought to be the subjects of distinct traverse, and therefore in violation of the 2d and 3d resolutions in *Crogate*'s case (*a*). The second resolution in that case is, " That when the defendant in his own right, or as servant to any other, claimeth an interest in the land, or to any common, or rent going out of the land, or to any way, or passage, upon the land, &c. there *de injuriâ suâ propriâ* generally is no plea. That if the defendant justifieth as servant, there *de injuriâ suâ propriâ* in some of the said cases, with traverse of the commandment, the same being made material, is good, &c. For the general plea *de injuriâ suâ propriâ*, is, properly, when the defendant's plea doth consist merely upon excuse, and upon no matter of interest whatsoever. And it is said *de injuriâ suâ propriâ*, because the injury properly in this case is to the person, or to the fame, as battery or imprisonment to the person, or scandal to the fame. There if the defendant excuse himself upon his own assault, or upon hue and cry, there properly *de injuriâ suâ propriâ* generally is a good plea, for there the defendant's plea doth consist only upon matter of excuse." The third resolution is, " That when by the defendant's plea, any authority or power is mediately or immediately derived from the plaintiff, there, although no interest be claimed, the plaintiff ought to answer to it, and shall not reply generally *de injuriâ suâ propriâ*." It is clear, therefore, according to these resolutions, that the plaintiff's replication is too general. In *Jones* v. *Kitchen* (*b*) it was held, that a plea de injuriâ suâ propriâ absque ullâ tali causâ to a cognizance for rent in arrear, is bad upon special demur-

(*a*) 8 Rep. 66, b. (*b*) 1 Bos. & Pul. 76.

rer; and the observations of *Eyre*, C. J. in that case are most cogent in their application to the present. In *Cockerill* v. *Armstrong* (a), which was an action of trespass for taking a gelding, the defendant pleaded, that the place in which, &c. was 100 acres, and that *J. S.* was seised thereof in fee, and that he, as his servant and by his express orders, took the gelding damage feasant; and it was held that the plaintiff could not reply de injuriâ suâ propriâ absque ullâ tali causâ, for that would put in issue three or four things, and that the plaintiff must traverse one thing in particular. *Bro. Ab. Tit. de son tort demesne*, pl. 23, 25, and 35. 2 *Saund.* 295. and 3 *Lev.* 65. are authorities to the same effect. Now in this case the replication puts in issue three distinct matters, namely, the trading, the act of bankruptcy, and the petitioning creditor's debt; and therefore, upon the authorities cited, this replication is bad for being too general.

Campbell, contrà, was stopped by the Court.

BAYLEY, J.—I am of opinion that this replication is sufficient. To support the demurrer in this case it must be contended, that if a party sues out a commission of bankrupt against a man who never was a trader, or who never was indebted, or who never committed an act of bankruptcy, in order to defend himself against an action of the present description, he can only put in issue one of these three propositions, and that he is bound to omit the other two. Such an argument, however, cannot possibly be sustained. The three circumstances which are necessary to sustain a commission of bankrupt, form one entire proposition; and therefore the replication is sufficient without replying, severally and respectively, to each of the facts, which are necessary to found a commission. The defendant pleads the plaintiff's alleged bankruptcy as mere matter of excuse; to which the plaintiff replies generally, that the commission was wrongfully sued out, which merely puts in issue the single point which the defendant alleges in excuse; and

(a) Bull, N. P. 93.

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Crogate's case is an authority to shew that the general replication de injuriâ suâ propriâ, is proper when the defendant's plea consists of matter of excuse and of no matter of interest whatever. I therefore think that this replication is not demurrable.

Holroyd, J.—I am of the same opinion. The defendant's plea, though it may consist of a statement of different facts, is reducible to one point of defence or excuse, and therefore the general replication de injuriâ suâ propriâ is sufficient. The case of *Robinson* v. *Rayley* (a) is a case in point. That was an action of trespass quare clausum fregit, and the defendant pleaded a right of common for his cattle levant and couchant; to this the plaintiff replied that they were not his own commonable cattle levant and couchant; and on special demurrer assigning for cause, that the replication was multifarious, the Court held the replication good, because the rule is not, that issue must be joined on a single fact, but on a single point, and that it is not necessary that the single point should consist only of a single fact, and Lord *Mansfield* says, "There the point is the cattle being entitled to common, this is the single point of the defence, but, in fact, they must be both his own cattle and also levant and couchant, which are two different essential circumstances of their being entitled to common, and both of them absolutely requisite." Now in the present case the material issue which would be taken on these pleadings is, whether the plaintiff had been duly declared a bankrupt within the meaning of the statutes concerning bankrupts. To constitute a man a bankrupt it is true that three things must concur, namely, the trading, an act of bankruptcy, and a good petitioning creditor's debt; but all these are merely the ingredients of one single proposition, which in this case is pleaded only in excuse, and therefore the general replication is sufficient.

Littledale, J.—I am also of the same opinion. It is

(a) 1 Burr. 316.

now settled that a plea of bankruptcy will put in issue all the circumstances necessary to support a commission, and therefore a general replication de son tort, &c. will be good to that, which forms but one single point or proposition.

Judgment for the Plaintiff on demurrer (*a*).

(*a*) *Vide* Com. Dig. *tit.* Pleader [F. f. 23.] *Cockerell* v. *Armstrong*, Willes, 99. *Cooper* v. *Monke*, Id. 52. *Bell* v. *Wardell*, Id. 202. 3 Burr. 1385. *Dayrolles* v. *Howard*, and *Crowther* v. *Ramsbottom*, 7 T. R. 654.

WILLIAMS *v.* MORLAND.

Running water is originally publici juris, and an individual can only acquire a right to it by applying so much of it as he wants to a beneficial purpose, leaving the rest to others, who, if they acquire a right to it by subsequent appropriation, cannot lawfully be disturbed in the enjoyment of it. But where the gravamen of an action on the case for disturbing a water-course, was that defendant had erected a dam above plaintiff's premises, on the river *L.* and widened another dam, and thereby prevented the water from running in its usual course, and in its usual calm and smooth manner, to plaintiff's premises, and thereby the water ran in a different channel and with greater violence, and injured the banks and premises of plaintiff, but without alleging that he had sustained an injury from the want of a sufficient quantity of water; and the jury having negatived any injury to the plaintiff from the causes assigned, but being of opinion that the defendant ought not to keep the water pent up in summer time:—Held, that the plaintiff was not entitled to a verdict.

THIS was an action on the case, in which the plaintiff declared in the first count of the declaration, that before the committing of the grievances hereinafter mentioned, he was lawfully possessed of a messuage or dwelling-house, lands, and premises, with the appurtenances, and by reason thereof, of right ought to have had and enjoyed, and still of right ought to have and enjoy, the benefit and advantage of the water of a stream called the *Lee* river, and which during all that time of right ought to have run and flowed, and until the committing of the grievances hereinafter mentioned, of right had run and flowed, and still of right ought to run and flow, unto and past his lands and premises, for supplying the same with water; yet defendant, well knowing the premises, but contriving and intending, &c. heretofore, and whilst plaintiff was possessed of the tenements with the appurtenances, to wit, on, &c. at, &c. wrongfully and injuriously erected and made a certain pent-stock, dam, or floodgate, in and across the said stream, higher in the said

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stream than the tenements of plaintiff; and wrongfully and injuriously widened and enlarged a certain other pent-stock, dam, or floodgate, then being in and across the said stream higher in the said stream than the lands and premises of plaintiff, and kept and continued the said first mentioned pent-stock, dam, or floodgate, so erected and made, and the said other pent-stock, dam, or floodgate, so widened, enlarged, and altered respectively, in and across the said stream, for a long space of time, to wit, from thence hitherto, and thereby unlawfully and wrongfully prevented the water of the stream from running and flowing along its usual and regular course, and in its usual calm, moderate, and smooth manner, unto and past the lands and premises of plaintiff as the same otherwise would have done, and thereby the water of the stream ran and flowed in a different direction or channel, and with much greater force, and increased violence and impetuosity, unto and against the banks and premises of plaintiff, and undermined, washed away, damaged, and destroyed the banks of the lands of plaintiff, &c. Second count, that defendant wrongfully and injuriously stopped, hindered, and prevented the water of the stream from running or flowing unto and past the tenements of plaintiff, along its usual or regular course, and in its usual calm and smooth manner, as the same otherwise would have done; and also wrongfully and injuriously caused the water of the stream to run and flow in another direction, with much greater force, violence, and impetuosity than it of right ought to have and would have done, in and against the lands and premises of plaintiff, and thereby the banks and other parts of the lands and premises of plaintiff were damaged and destroyed. Plea, the general issue, not guilty, and issue thereon. At the trial before *Graham*, B. at the last *Summer* assizes for the county of *Kent*, the jury, upon the facts proved in evidence, delivered a special verdict, giving it as their opinion, that no damage had been done to the plaintiff's banks or lands, by the erection of the pent-stock, or sluices made by the defendant;

and that if any injury had arisen to the plaintiff it was to be attributed to the plaintiff's own neglect in not keeping his banks in repair; but they added, "We think the defendant ought not to pen up the water in summer time." It was then contended, on the part of the plaintiff, that this finding amounted to a verdict for the plaintiff upon the second count. The learned judge, however, thought the plaintiff concluded by the finding of the jury; inasmuch as the gravamen of the action was not in depriving the plaintiff of the usual supply of water, but that the course of the stream had been altered, and that the water was thereby caused to flow with greater impetuosity, force, and violence, so as to injure his banks, and the jury having expressly found that the plaintiff had sustained no injury from that cause, the verdict ought to be entered for the defendant; and a verdict for the defendant was entered accordingly, with liberty, however, to the plaintiff to move to enter a verdict with nominal damages, if the Court should be of opinion that he was so entitled.

Chitty, in *Michaelmas* Term last, moved accordingly, and obtained a rule nisi.

Marryat (with whom was *Bolland*) was now instructed to shew cause, but the Court stopped him, and

Chitty being called upon to support the rule, contended, that the latter part of the finding of the jury clearly entitled the plaintiff to a verdict for nominal damages. The jury having expressed their opinion that the defendant ought not to pen up the water in the *summer* time, was demonstration that, in their judgment, the plaintiff had sustained some damage; but whether they were of that opinion or not, it was a necessary inference, that the plaintiff had sustained an injury by the penning up of the water, whereby he was deprived of the benefit of that usual supply of water at a season of the year when water was most necessary to the

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beneficial occupation of his premises. It was impossible to doubt that, in this respect at least, the plaintiff had sustained an injury. To entitle the plaintiff to a verdict, it was not incumbent on him to shew that he had sustained any pecuniary damage. It was sufficient to lay before the jury general evidence, that he had been prejudiced in the enjoyment of the stream of water, which had before the cause of action in question ran and flowed past his lands and premises. In trespass it is a settled rule, that actual damage need not be proved, and even though special damage be alleged, no evidence of such damage is necessary to entitle the plaintiff to a verdict. On the second count at least, the plaintiff was entitled to have a verdict, because the allegation there was that the defendant had wrongfully and injuriously prevented the water of the stream from running or flowing unto and past the tenements of the plaintiff. That allegation was proved in evidence, and affirmed by the finding of the jury; and though no special damage was alleged or proved, still, in point of law, the plaintiff was entitled to a verdict for nominal damages.

BAYLEY, J.—It appears to me, that this rule ought to be discharged, and my opinion is founded on the nature of running water, and the manner in which a right to it can be obtained. Running water is originally publici juris; but as soon as a man has appropriated any part of a running stream to his own use, which was previously unoccupied by any body else, he may acquire a right to the part he has so appropriated, and his right will be co-extensive with the beneficial uses to which he is capable of applying it; and subject to that right, the rest is left at large for the benefit of the public. The person who first obtains a right to the exclusive enjoyment of water, is considered by law as having the primitive right, and the rights of other persons will be subject to his; and he who obtains the secondary right must use his own so as not to interfere with the rights of others. If that is the true character of the right to water,

it follows as a necessary consequence, that when a party complains that another has deprived him of water which came to his premises, he must shew that it was water that he had a right to have the beneficial use of, and that he was deprived of that which he was capable of applying to some uses of his own. The plaintiff, by his declaration, claims a right to the use of this water at all times, but still if he had as much water as was necessary to supply his land, the defendant would be guilty of no wrong in preventing any additional quantity from coming to his premises. It is not necessary that the plaintiff should have a greater supply, if he already has the ample use, benefit, and enjoyment of as much as he can possibly want. The gravamen of the injury alleged in the first count of the declaration is, that the defendant unlawfully and wrongfully prevented the water of the stream from running and flowing in its usual and regular course, and its usual calm, moderate, and smooth manner, unto and past the plaintiff's lands, as the same otherwise would have done, and thereby the water of the stream ran in a different direction, &c. The plaintiff does not here complain that he was deprived of that usual and ample supply of water which was necessary for the supply of his land, and the ample and convenient use thereof. He complains of an alteration of the course of the river; but non constat that that deprived him of the necessary supply of water for his premises. Then the second count does not carry the case any farther; and indeed, I doubt whether that count could be supported in law. The gravamen of that count is, that the defendant wrongfully and injuriously stopt, hindered, and prevented the water of the stream from running and flowing in its usual or regular course, and in its usual calm and smooth manner. Suppose that to be so, still it does not appear that the plaintiff has sustained any injury. He has not alleged any; and as he has sustained none, then he is clearly not at liberty to predicate that the defendant has wrongfully prevented the water from running in its usual course. The jury have negatived all injury,

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and therefore it appears to me that the defendant is entitled to retain the verdict.

HOLROYD, J.—I am also of opinion, as far as the circumstances of this case are communicated to us, that the verdict which was entered for the defendant is correct, and that the plaintiff is not entitled to have a verdict entered for him. Running water is not in its nature private property originally; at least no longer than it remains on the land of the person to whom it comes. Now, before the water came to the plaintiff's premises, independently of appropriation or prior usage, he would not be entitled to it; nor could it be said to be his property though he might sustain some damage by the stoppage of it. Running water may become the property or quasi the property of another person before it comes to the plaintiff's premises, either by prior use or previous appropriation to himself, and that person may have a right to use it so as to prevent its coming at all times in a particular manner to the premises of others. This principle may, in its application, be extremely advantageous to the public. Many very valuable mills, which are of great benefit to the manufactures of the country, could not exist but for this doctrine. In the case of *Bealy* v. *Shaw* (a) that principle was recognised and acted upon; but the decision there will not help this plaintiff, because he does not, by his declaration, allege a cause of injury, to which that case can apply. In that case the persons under whom the defendants claimed had erected a mill near the river *Irwell*, in the year 1724, and water was brought from the river, by means of a weir and sluice, adequate in quantity to the wants of the then owners, the remainder continuing to flow on as before in the natural channel. Two other weirs were subsequently erected at different periods on the same premises, and as the works were from time to time enlarged, more water was taken from the *Irwell* to supply them, and no objection was made, there being then no other mill on the

(a) 6 East, 208.

stream in that part of the country. In the year 1787 the plaintiff erected a weir and sluice on his premises, which were situated lower down on the stream, and between the works of the defendants and the tail of their sluice, where the water was again returned into the bed of the river, which there made a great bend. In 1791 the persons under whom the defendants immediately claimed, erected another weir about forty yards higher up the river, and at the same time the sluice by which their works were supplied was considerably widened and deepened, so that nearly double the quantity of water was drawn from the *Irwell* which had ever before been taken. The effect of this was, that the works of the plaintiff were materially impeded, and they were sometimes obliged to stop working altogether; and the Court held that though the defendants or those from whom they claimed might have originally appropriated the whole of the water to themselves, yet as the plaintiff had subsequently appropriated the remainder to himself, they could not by enlarging their sluice deprive him of that water in which he had acquired a right by enjoyment. If in the present case the plaintiff had framed his declaration so as to shew that he was entitled to the unappropriated water of the stream, and had alleged that he had been deprived of the use of the surplus water, then possibly he might have been entitled to a verdict, but the present declaration is framed with a totally different view from that now insisted upon as the ground on which he is entitled to a verdict. This action is not for preventing the water from coming down to the plaintiff's premises, but it is for erecting one pent-stock and enlarging another, so as to prevent the water of the stream from running along in its usual and regular course, and in its usual calm, moderate, and smooth manner, and diverting it into another channel, so as to let it come with much greater impetuosity against the plaintiff's premises than before. Undoubtedly it is alleged in the declaration that the plaintiff had the enjoyment and use of the water, and it was proved that the water was prevented from going down to

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the plaintiff's premises; but it is not alleged that the plaintiff was damnified by the want of water, or that his premises were of less value than if the water had been suffered to flow in the former manner. Nothing of that kind is alleged, nor indeed was any thing of that kind proved. The learned Judge's report appears to me to shew, that no injury was done to the plaintiff's premises, and what the jury have found, negatives any right of action for the injury for which the plaintiff claimed to recover. We must, therefore, consider this declaration as framed upon a cause of action which was not proved. Merely obstructing the water which had been accustomed to flow through his lands, does not per se afford any ground of action. Some benefit must be shewn to have arisen from the water going to his lands, or at least it was necessary to shew that some deterioration was occasioned to his premises from the subtraction of the water. That not being the case, the plaintiff is clearly not entitled to a verdict.

LITTLEDALE, J.—I am of the same opinion. The first count of the declaration does not allege that the plaintiff has been deprived of any benefit arising from the water; but the allegation is, that the defendant wrongfully and injuriously diverted the water in such a way as to prevent its flowing in its usual calm, moderate, and smooth manner. It does not go on to say, that the plaintiff had been thereby deprived of the use and benefit of water for the necessary enjoyment of his premises. The way in which the plaintiff's declaration is framed in the beginning, shews that the case put by Mr. *Chitty* of an action of trespass is wholly inapplicable. In actions of trespass it is in general not necessary to prove pecuniary damage to have been sustained, although it be alleged; for in trespass to land, for instance, if a man wrongfully comes upon the land of another, in point of law damages are considered as consequent, though none be actually sustained. So if a man has a right of way, and his right be obstructed or hindered, that will give him a cause of action,

although he sustains no pecuniary injury. The same principle applies to the disturbance of a right of common, where the injury being to the right which the plaintiff is entitled to exercise, from day to day, a cause of action arises, though no actual injury is sustained. This is a settled principle in the cases to which I have alluded; but generally speaking there must be a temporal loss or damage accruing from the wrongful act of another, in order to entitle a plaintiff to maintain an action on the case. *Com. Dig. tit. action upon the case for a disturbance*, A. 1. Now, applying that principle to the present case, it is clear that the plaintiff has made out no title to a verdict. Assuming that the finding of the jury shews that the plaintiff has sustained a wrong and injury by the act of the defendant in penning up the water during the summer, still the plaintiff has not alleged any temporary loss or damage by reason of that circumstance. The plaintiff might sustain a temporary loss or damage by the deprivation of water during that particular season of the year. It may be intended that during the time the alleged obstruction took place, he had occasion for water for domestic purposes in his house or for the irrigation of his meadows, yet the finding of the jury will not entitle him to a verdict for an injury which he does not allege in his declaration. The plaintiff may have a remedy if he sustains a temporary loss or damage in this respect; but water is of that peculiar nature, that a man cannot say that the mere diversion of it will, per se, give him a right of action : some special injury must be alleged and proved. Assuming, however, that the plaintiff may have sustained a loss by the act of the defendant in stopping the water during the summer, still that is not the ground of his complaint. He only alleges that his banks have been injured by reason of the flowing of the water in a more impetuous manner through a different channel. He does not complain of any want of water, or that he has sustained any damage by the penning up of the stream; and therefore to entitle him to a verdict, he must not only have alleged but proved a damage arising from the want of water.

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It is a general rule of law that everybody has a right to use the water of a stream provided he does not, by the use of it, injure any right which other persons may have acquired by previous appropriation. If a man has acquired a right over water by appropriating it to his own benefit, he may divert it to his own purposes, but if he has never appropriated the whole of it to his own use, it is very fit and proper that other persons should have the benefit of the surplus; but inasmuch as this declaration does not allege that the plaintiff has sustained any injury, the mere diverting of the water will not alone entitle the plaintiff to maintain an action.

Rule discharged (a).

(a) Vide *Duncombe* v. *Randall*, Hetley, 32; *Brown* v. *Best*, 1 Wils. 174; and *Cox* v. *Mathews*, 1 Vent. 237.

The KING v. R. S. COOKE.

The Court will not allow a defective plea in abatement, to an indictment for a misdemeanour, when once pleaded, to be amended.

Plea of peerage by way of abatement to an indict- for a misdemeanour:— Held, ill on demurrer for not shewing in what manner defendant derived his title and that he was a peer of the United Kingdom.

INDICTMENT against *Cooke* and others for a conspiracy, to which the defendant *Cooke* pleaded in abatement as follows;—"And *Richard Stafford Cooke*, Lord *Stafford*, Baron *Stafford*, who is indicted by the name of *Richard Stafford Cooke*, late of the parish of *Castlechurch*, in the county of *Stafford*, gentleman, in his own person comes, and having heard the said indictment read, prays judgment of the said indictment, because he says, that on the day of taking the inquisition aforesaid, and long before, he was, and from thence hitherto hath been, and still is, Lord *Stafford*, Baron *Stafford*, and the state, degree, title and honour of Lord *Stafford*, Baron *Stafford*, on the day of taking the inquisition aforesaid, and long before, had and enjoyed, and still has and enjoys; and this he the said *Richard Stafford Cooke*, Lord *Stafford*, Baron *Stafford*, is ready to verify. Wherefore, &c. Demurrer to the plea, and joinder in demurrer.

The Court having refused to quash the plea upon motion (*a*), and the prosecutor having subsequently demurred to it,

Campbell, in *Easter* Term last, moved for leave to amend the plea, sed,

Per Curiam.—This is a dilatory plea; a mere plea of misnomer; standing upon the same footing as the common pleas in abatement in civil cases, which are never allowed to be amended. It goes merely to the description of the defendant, and entirely avoids the merits of the case. The indictment must be tried in the same form, whether the plea is true or false. If we were to allow the defendant to amend, we should in effect be trying the question of the peerage. No instance can be found in which such a permission has been granted, and the Court will not depart from the rule laid down in civil cases, not to allow a plea in abatement to be amended, and thereby set up a precedent, which would be highly dangerous in its consequences.

Rule refused.

The demurrer was now argued by

Talfourd, on the part of the prosecution. There are two objections to this plea, and both are fatal. First, it does not shew upon the face of it that the defendant claims to be a peer of *England* or of the United Kingdom; and second, it does not set out the mode in which he derives his claim. First, no one can claim to be a peer of the realm without first shewing that he is a lord of parliament: Lord *Sanchar*'s case (*b*); and 2 Inst. 667, where it is said by Lord *Coke*, "all dukes, marquesses, earls, viscounts, and barons of other nations, or which are not lords of the parliament of *England*, are named armigeri, if they be no knights, and if knights, then they are named milites." The plea claims the title of "Baron *Stafford*," not Baron *of Stafford*, and therefore

(*a*) Vide ante, 114.

(*b*) 9 Rep. 117.

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does not shew that the title is taken from any place within the United Kingdom, for the title of Baron *Stafford* may exist in some other country; and although it may not be necessary to shew a derivation of the title *from England*, still it is necessary to shew, what is certainly not shewn by this plea, a right to enjoy the title *in England*. A plea, similar to this, has indeed been held sufficient, without averring that the defendant was Unus Parium Regni Angliæ; *Rex* v. *Knollys* (*a*): but the ground of that decision was that the plea set out the letters-patent by which the peerage then in question was created. It will, perhaps, be said that as there is in the statute book an act of parliament (*b*), entitled "An act for the restitution in blood of the Lord *Stafford*," the Court must take judicial notice that "Lord *Stafford*, Baron *Stafford*," is an *English* title; and that so the plea may be supported. But in the first place that was only a private and personal act, therefore the Court cannot take judicial notice of it; and in the second, as the plea does not shew that the title now claimed is the same as that mentioned in the act, the Court cannot intend their identity. The distinctions between a public and a private act are enumerated in *Buller's* Nisi Prius (*c*), and this act does not possess any one of the characteristics there attributed to public acts. But if the act could be noticed, still it does not respect the same title which the defendant claims, for the act restored the party to the title of Lord *Stafford*, and authorised him to bear the arms of the Barons *of Stafford*, whereas the defendant claims to be Baron *Stafford*. Secondly, the plea is bad for not shewing how and by what mode the defendant derives his title. There are four modes of doing this; by writ, by letters-patent, by descent, and by prescription. The first of these would be triable by record, the second by production of the letters-patent, and the third and fourth by the country; *Rex* v. *Knollys*, and the authorities there cited: and therefore unless the mode by which the title is derived appears upon the plea, it is bad for uncertainty, for

(*a*) 1 Ld. Ray. 10. (*b*) 1 Ed. 6. (*c*) 223.

the prosecutor cannot possibly ascertain in what form he is to take issue upon it. It is only further to be observed that this is merely a dilatory plea, and therefore will not be viewed with favor by the Court, as it tends to a delay of public justice.

Campbell, contrà. The Court will, if they can, give a reasonable intendment to the plea, and so construed, there is enough stated upon the face of it to lead them to the presumption that the defendant is and claims to be a peer of *England* and of parliament. [*Bayley*, J. May he not be Baron *Stafford* of *Ireland*, or of any other country?] The statute 1 Ed. 6. proves the title to be *English*, and the Court will not go out of their way to infer that it is foreign. Without the statute it would perhaps be difficult to support the plea, but thus aided the plea is clearly good. If the 1 Ed. 6. is a public act, the Court will look at it the same as if it had been set out in the plea. Now it is a public act. All acts which respect the government and measures of state, are public acts: that is the true criterion. This act touches the king's prerogative; it affects one branch of the legislature, and consequently all the peers of the realm; and as such it is a public act, and must be judicially noticed by the Court. Then, what is the operation of the act? It restores Lord *Stafford* in blood; it declares that he shall have in parliament and in other places,. the room, name, place, and voice of a baron, and it empowers him to take and bear the arms of the Barons of *Stafford*. In judicial proceedings of whatever kind, if a person is described as a peer by a title of peerage *in England*, he must be considered as described and as being a peer *of England*. Such is the description in this act; the barony of *Stafford* is described as a peerage *in England*, and therefore the person so alluded to must be taken to be a peer *of England*. Neither does the plea present any difficulty to the prosecutor in taking issue upon it, for the act shews the origin of the peerage, which can have come to the defendant only by descent; and

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therefore it was not necessary to aver a claim by descent, and the plea is good without such averment.

Talfourd, in reply, was stopt by the Court.

Bayley, J.—The defendant insists that he is not properly described in the indictment, but if the indictment had described him as a peer, he would not thereby have been entitled to claim any privilege of peerage. The plea therefore is a dilatory plea, an ordinary plea in abatement, and falls within the rule which says that pleas in abatement to writs or indictments must give a better writ or count, and must be certain in every particular: consequently the defendant was bound to shew, not only that he had the right to a peerage, but also the mode by which he derived that right. There are many good reasons for this rule, as applicable to the present case. In the first place, the prosecutor has a right to take issue upon the fact of peerage, and the mode of trial depends upon and varies with the nature of the claim. If the defendant claims to be a peer by writ, he is no peer until he has taken his seat as such, and that fact must be tried by the record of parliament. If he claims by patent, the patent must be produced, and then, and not till then, his title is complete. In such a case the replication would be non concessit, and that issue would be triable by the patent itself. If he claims by descent, or by prescription, that must be tried by a jury. The difference in the mode of trial, consequent upon these different species of claim, shews that the omission in this plea of the particular mode in which the defendant claims his title, is an objection to the substance, and not merely to the form of the plea; though that is unnecessary, because a plea in abatement must be good in form as well as substance. Then, is this objection obviated by the statute of *Edward* the sixth? I think clearly not. The defendant styles himself Lord *Stafford*, Baron *Stafford*, but the mere calling a person a lord will not shew him to be a peer of parliament, as was decided

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in *Lovel's* case, cited in the Countess of *Rutland's* case (*a*). But it is said the Court must presume that the defendant is the heir male of the person restored to the title of Lord *Stafford* by the act. If the description of the defendant in the plea were the same as that in the act, which it is not, still it would be necessary for him to aver that he was the heir male; and looking at the act and the plea, before the Court can identify the title in the one with that in the other, they must presume much more than they ought to do in favor of a plea in abatement. There may be other Lords *Stafford*. "Lord *Stafford*" is the only title which the act recites; for though it declares that he shall be a baron, it does not say by what title. It empowers him to bear the arms of the "Barons of *Stafford*," evidently leading to the presumption that the original title had been, not Baron *Stafford*, but Baron *of Stafford*. In either point of view, therefore, this plea is bad. If we exclude the act from our consideration, it is bad for not shewing how the title claimed is derived. If we take notice of the act, as a public act, (and whether we can or cannot do so, it is not necessary on the present occasion to decide, and upon that point, therefore, I express no opinion,) it is equally bad, for not averring that the defendant is the heir male of the person restored to the peerage by the act. For these reasons I am of opinion that there must be judgment of respondeat ouster.

Holroyd, J. concurred (*b*).

Judgment accordingly.

(*a*) 6 Rep. 53. (*b*) *Littledale*, J. was absent.



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The privileges conferred by the copyright acts of this country, do not extend to books printed abroad.
Where the author of a musical composition sold the right of publishing it to a music seller in *Paris* in 1814, reserving to himself the right of publishing it in *England*, and in the same year he sold the work to *A.* an *English* music seller, by *parol*, who immediately published it; and in 1818, *B.* another *English* music seller, bought a *French* copy of the composition, in the fair way of his trade, at *Paris*, and republished it here on his own account; and in 1822 the author executed a valid assignment of the copyright to *A. in writing*:—
Held, that *A.* could not maintain an action against *B.* for piracy

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THIS was an action on the case, in which the plaintiffs declared, that before and at the time of committing the grievances thereinafter mentioned, they were the proprietors of the copyright of and in a certain book, being a musical composition, called "*Vive Henri Quatre*, the celebrated *French* national air, with an introduction, and eight variations for the piano-forte," first printed and published within fourteen years last past; to wit, at *Westminster* in the county of *Middlesex*; yet defendant, well knowing the premises, but contriving, and wrongfully and injuriously intending, &c. theretofore, and after the passing of a certain act of parliament, passed in the 54th year of *Geo.* 3., to wit, on the 26th *January*, 1822, and on divers other days and times between that day and the day of exhibiting the bill of the said plaintiffs against defendant, to wit, at, &c. knowingly, wrongfully, and injuriously, and without the consent of plaintiffs, so being the proprietors of the copyright of and in such book, first had and obtained in writing, printed and caused to be printed divers, to wit, 2000 copies of the said book of plaintiffs, by means whereof plaintiffs were greatly injured and damnified, to wit, at, &c. There were seven other counts for publishing and exposing to sale pirated copies of the same work. At the trial before *Abbott*, C. J. at the *Middlesex* Sittings in last *Hilary* Term, the plaintiffs had a verdict with nominal damages, subject to the opinion of the Court upon the following case:—

Mr. *F. Kalkbrenner*, a foreigner, composed the music in question in *France*, in the year 1814. Before he came to *England*, which he did in *June* in that year, he agreed with Mr. *Pleyel*, a publisher of music in *Paris*, that he should have the right of publishing such music in *France* only, reserving to himself the right of publication in *England*. It was not published in *France* before Mr. *Kalkbrenner* quitted that country to come to *England*. On the 17th of

June, 1814, there were deposited by Mr. *Pleyel* five copies of the musical composition in question in the depôt at *Paris*, for entry of copyright in *France*. It has been published and sold in *France* up to the present time. Shortly after Mr. *Kalkbrenner* arrived in *England*, viz. on the 12th of *July*, 1814, he sold the work in question, with two others, by a parol agreement, for the sum of 30*l.* to the plaintiffs, and two other partners since dead; and which sum was then paid to him for the same. A few days after such sale, Mr. *Kalkbrenner* returned to *France*, and there corrected the engraving of the composition for the publication in *Paris* for Mr. *Pleyel*, and did not see the work published at *Paris* till the following year, 1815. The plaintiffs first published the composition in *England* between the 3d and 10th of *September*, 1814. At the distance of two years after this, Mr. *Kalkbrenner* was paid by Mr. *Pleyel* 200 francs, which is equal to about 8*l.* sterling, for the right Mr. *Kalkbrenner* had so sold to him. On the 24th of *January*, 1822, Mr. *Kalkbrenner* being in *England*, executed an assignment in writing of his copyright in the musical composition in question to the plaintiffs, agreeably to the terms of sale made by him to them in 1814. The defendant sold a copy of the work in question to Mr. *Lindsey* on the 20th of *February*, 1822, at his shop in *London*, for two shillings. Such copy was on *English* paper, and from an *English* engraving. The son of the defendant, in 1818, purchased a copy of the composition published by Mr. *Pleyel*, at a shop in *France*, with a number of others by the same author, which the defendant caused to be engraved and published in *England* in *December*, 1818. The defendant's edition was a fac-simile of the copy so purchased by his son, and there was no difference between that edition and the edition published and sold by the plaintiffs in *England*. There is a register kept at *Paris*, and by the law of *France*, all musical publications must be registered, and a copy of the said composition was duly registered and deposited there on the 17th of *June*, 1814. The defend-

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ant's son never heard or saw the composition until he saw it at the shop in *Paris* in 1818.

Comyn, for the plaintiffs. The plaintiffs are entitled, as the proprietors of the copyright, to maintain this action. By the statute 8 *Anne*, c. 19. the sole right of printing any work was conferred upon the author, or his assignee, for fourteen years, that period to begin from the day of his first publishing the work. That statute is explained and extended by the subsequent statutes 41 *Geo.* 3. c. 107. and 54 *Geo.* 3. c. 156., and as all three were passed for the purpose of protecting the rights of authors, they must all receive the construction most favorable to authors. The first publication by the plaintiffs, who were the assignees of the author, was in *September*, 1814; and though that, according to the case of *Power* v. *Walker* (*a*), did not confer upon them the exclusive right of printing the work, because there was no consent of the author in writing for that purpose, as required by the statute, still, as that publication was made with the consent of the author, it must be taken as a publication by him, and then the subsequent printing of the work by the defendant becomes a wrongful publication, for which the plaintiffs are entitled to a remedy. The partial sale of the work by the author in *France*, in 1814, did not give the defendant any right to publish it in *England*. The right in the work vested in the author in 1814, and it remained entire in him until he made a legal assignment of it to the plaintiffs in 1822. Therefore a sale by the defendant after that assignment was an infringement of the right then vested in the plaintiffs, by means of which they have acquired a good right of action.

Campbell, contrà. The work was first published, with the consent of the author, in *France*, and by that act his right to an exclusive publication in *England* was gone. It is true, that in *Edgeberry* v. *Stephens* (*b*) it is said, " a grant

(*a*) 3 M. & S. 7. (*b*) 1 Salk. 447.

of a monopoly may be to the first inventor by the 21 *Jac.* 1. and if the invention be new in *England*, a patent may be granted, though the thing was practised beyond sea before;" but that case depended upon the language of a statute very distinct in its object from those now in review; "for," it is added, "the statute speaks of new manufactures within this realm; so that if they be new here, it is within the statute; for the act intended to encourage new devices useful to the kingdom, and whether learned by travel or by study, it is the same thing." The statute of *Anne* confers upon the author the exclusive right of printing, for a period which is to commence from the time of his first publishing, and that statute, as well as those which followed it, clearly apply to works first published in *England*. The second section of the 8 *Anne*, which requires the entry of all books, and the delivery of a certain number of copies of them at Stationers' Hall; and the fourth section, which empowers the Archbishop of *Canterbury*, and the other officers of state, to regulate the prices of books; both plainly refer to works published for the first time in *England*. The seventh section, which provides that the act shall not extend to prohibit the importation of any book printed in *Greek*, *Latin*, or any other language, beyond sea, evidently implies that any book actually printed in a foreign country, may legally be imported into this country, and sold here; and if it is allowable to sell such books here, it seems impossible to give any good reason why it should not also be allowed to reprint them here, which would be beneficial to the nation, as affording a mode of employment for *British* capital, talent, and industry. The 12 *Geo.* 3. c. 36. which has not been cited on the other side, strengthens this argument, because, although it prohibits the importation of books originally printed in *England* and subsequently reprinted in foreign countries, it does not prohibit the importation of books originally printed in foreign countries. By originally publishing his work at *Paris*, the author dedicated it to the service of all mankind, and having so done, he cannot after-

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wards set up a claim to the exclusive publication of it in *England*. There can be no doubt that the defendant might legally have imported and sold in this country any number of copies printed in *France*; and upon what principle can it be contended that he might not also reprint the work here? Can it be said, that if some individual in *England* reprints a work which has been published for half a century in *France*, the author may, after such an interval, come forward here for the first time and claim the copyright, reprint it here himself, and then maintain an action against the individual who had already reprinted it here? Surely not; and yet to that length the argument on the part of the plaintiffs must go. If the author had the right to an exclusive publication in both countries, the plaintiffs are not his assignees within the meaning of the statute. They are the assignees of a part of the copyright only; but a copyright cannot be divided into parts; and therefore, upon that ground, this action is not maintainable. But if they are, properly speaking, the assignees of the copyright, still, no right vested in them until the year 1822, before which time the defendant had published the work here. That was a lawful publication, for he might then have imported copies of the *French* publication, and therefore the subsequent sale was lawful also. The main argument however is, that the author having previously published in *France*, has dedicated the work to all the world, and cannot now set up a claim to an exclusive publication in *England*.

The case was argued on a former day, when the Court took time to consider of their judgment, which was now delivered by

BAYLEY, J. who, after stating the facts of the case, proceeded as follows:—The question for the consideration of the Court is, whether, under the circumstances of this case, the plaintiff is entitled to maintain this action. The first point is, whether the publication of the work in the month

of *September*, 1814, gave any privileges [conferred upon authors under the different acts of parliament on which the question arises] either to the plaintiffs, or to *Kalkbrenner*; and we are of opinion that it did not. We think it clearly gave none to the plaintiffs, because there was no assignment or consent in writing from *Kalkbrenner* to them, so as to make it a privileged publication; for, according to the case of *Power* v. *Walker*, which is founded upon the words of the different statutes, there must either be a consent or an assignment in writing, a parol assignment being insufficient to confer any privilege upon the assignee by whom the publication is made. We think also, that there was no exclusive privilege conferred on *Kalkbrenner*, because the work was not printed on his account, nor had he any thing to do with the printing of it; and though he had done what he might think sufficient to give a right to the present plaintiff to print and publish, yet he had not done that with any view of conferring a benefit or privilege on himself. Then the next question is, whether the publication by the defendant, in 1818, was at that time a wrongful publication, so that *Kalkbrenner*, or any other person who might claim under him, and have an effectual title under him, might either immediately, or at any distant period of time, when he or they should have printed and published in this kingdom, put a stop to the defendant's publication. That question will depend upon two points; first, whether the statutes which give a privilege to publications in this country, confine the privilege to books printed here, or whether they extend the privilege to books printed abroad, which have never been published by the author here; and second, whether that privilege extends to the case of an author who first publishes abroad, and afterwards publishes here, but not until a reasonable time for his publishing in this country has elapsed, and after some other person, without any fraud, and in the fair course of trade, has published the work here. It appears to us, upon looking at the different statutes upon this subject, that they confer the privi-

lege upon *British* publications only, and that they do not confer, and were not intended to confer, any privilege on foreign publications. The different statutes upon this subject, it is to be observed, apply to *printed* books, and to printed books only. It is recited by 8 *Anne*, c. 19. "That printers, booksellers and others, had of late frequently taken the liberty of printing, reprinting, &c. books and other writings without the consent of the authors or proprietors of such books and writings, to their very great detriment, and too often to the ruin of them and their families;" and to prevent such practices in future, and for the encouragement of learned men to compose and write useful books, it enacts, that the author of any book or books already printed, &c. shall have the sole right and liberty of printing such book or books for the term of twenty-one years; and that the author of any book or books already composed, and not printed and published, or that shall thereafter be composed, shall have the sole right of printing such book or books for the term of fourteen years; and that if any other person shall print, reprint, or import any such book or books without the consent of the proprietors thereof first had and obtained in writing, signed in the presence of two or more witnesses; or knowing the same to be so printed or reprinted, shall sell, &c. without such consent, he shall be liable to the forfeitures and penalties therein mentioned. By sect. 2. it is enacted, that no person shall be subject to these forfeitures or penalties for printing or reprinting any book without such consent, unless the title of such book hereafter published shall, before such publication, (that is, by the author,) be entered in the register book of the company at Stationers' Hall, &c. By sect. 5. it is enacted, that nine copies of each book, on the best paper, that shall be printed and published as aforesaid, &c. shall be delivered to the warehouse keeper of the company at Stationers' Hall, &c. before such publication made, for the use of the royal library, and the libraries of *Oxford*, *Cambridge*, the four *Scotch* universities, *Sion College* in *London*, and the Faculty

of Advocates' Library in *Edinburgh*, on pain of forfeiting five pounds for every copy, besides the value of the copy to be recovered, &c. and if the penalties are incurred in *Scotland*, they shall, by sect. 6., be recovered in the Court of Session; and by s. 7 it is enacted, that nothing in this act shall be construed to extend to prohibit the importation, vending or selling of any books in *Greek, Latin*, or any other foreign language, printed beyond the seas. Therefore the statute of *Anne* applies not only to books thereafter to be printed, but extends also to books which have been previously printed, and it would have been a remarkable thing if the legislature had been conferring this exclusive privilege, at that period of time, upon books which had not been printed in this kingdom, but which had been printed abroad. The legislature must be presumed to have *British* interests and *British* learning in view when they passed this act. Printing works in this kingdom brings into activity *British* capital, *British* workmen, *British* materials, and it produces a circulation of literary knowledge within the reach of the *British* public. Upon publications printed abroad, *British* capital, *British* workmen, or *British* materials are not likely to be employed, and it may be matter of mere chance whether such works when published will ultimately reach the *British* public or find their way amongst *British* readers, and if they do, the advantage will not be so great as if they were published in this kingdom. And, therefore, unless there were words clearly shewing that the privilege was meant to be extended to works printed abroad, we think, from the nature of the thing, the privilege must be confined to books printed in this country. The words of the statute of *Anne*, it is true, speak generally of *printing*, without saying *where printed*, but that is an act of the *British* legislature, and therefore the *British* legislature would naturally have it in contemplation to protect *British* interests; and the provisions not only of that, but of subsequent acts of parliament, clearly shew, that *British* publications only were in the contemplation of the legislature

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at the time when that and the subsequent acts passed. The provision in the 8 *Anne* that the authors of books, generally, shall have the sole right of printing and reprinting, and that, before the publication, the title of the book shall be entered, and that copies shall be delivered at Stationers' Hall, manifestly contemplate *British*, and not foreign publications. The statute 12 *Geo.* 2. c. 36. which prohibits the importation of books reprinted abroad, that have been first composed or written and printed in *Great Britain*, evidently considers the privilege conferred by the statute of *Anne* as confined to books printed here. The statute 41 *Geo.* 3. c. 107. contains provisions similar to those in the 8 *Anne* and 12 *Geo.* 2. and extends those privileges to works published in *Ireland* and other places, so as to prevent the pirating of *British* works in any of the *British* dominions within *Europe* not protected before. The 54 *Geo.* 3. supersedes the necessity of leaving copies at Stationers' Hall at all events, but contains a provision that, upon demand made in writing, at the place of abode of the publisher, within twelve months after the publication thereof, eleven copies shall be delivered at Stationers' Hall, under a penalty of five pounds for each copy not delivered, and the value; and therefore that act clearly contemplates that the publisher is to be a person who is to have a place of abode in this kingdom, which would not be likely to be the case with a person who prints books abroad. We are, therefore, of opinion, that the privileges mentioned by these several statutes, were manifestly intended to be conferred upon books printed in this kingdom, and not upon books printed abroad. Then if that be the case, it is clear that in the year 1818, when the defendant printed his work, his publication of it was not wrongful, but was warranted by law. It is true that in *September*, 1814, the work had been published here, but that was not a publication by the *author*, and therefore he had no privilege conferred upon him, and being published by the plaintiff under a parol license only, he had no rights which were protected by the statutes. Then the question arises whether the subsequent assignment in *January*, 1822,

by *Kalkbrenner*, in writing, to the present plaintiff, gave him a right from that period to put a stop to the circulation of the defendant's work. If an author immediately before publishing abroad also takes steps for publishing here, whether he would be entitled to the privilege or not of an exclusive publication here during the period of time to which the statutes apply, it is not necessary for us in this case to consider, because this is not a case in which the author himself took any step for immediate publication here. The publication by the defendant was founded upon something which he had honestly obtained, not in fraud in any respect of *Kalkbrenner*, the original author, but in the general and ordinary course of trade; and we think it would militate most strongly against the encouragement which the legislature intended to confer upon books printed here, if we were to say that the author would at any distant period of time be entitled, by chusing himself to print here, or by authorising some other person to print for him, to supersede a fair, honest, and bonâ fide publication, which had taken place in the mean time. If the author himself is active in taking steps for immediate publication before any body else, he has some merit with the *British* public, and may be entitled to protection from *British* acts of parliament; but if we were to say in this case, that the plaintiff was entitled to supersede that which had been honestly published by the defendant, we should be holding that an author who might never mean to confer any privilege on this kingdom, would be at liberty, at any time, to supersede *British* printing, the employment of *British* capital, and of *British* workmen, and deprive the *British* public of that benefit which an early publication of the work would be calculated to confer. For these reasons it appears to us, that the publication in 1814 gave neither to the plaintiff nor to *Kalkbrenner* any exclusive privilege, and that the defendant's publication in 1818 was not wrongful, nor in opposition to any privilege previously obtained in favor of the work in question; and on the ground that the rights

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which the defendant then acquired to publish, could not be superseded by a license, on the part of *Kalkbrenner*, to publish at a subsequent period of time, we are of opinion, that the plaintiff did not establish an exclusive right of printing and publishing in this kingdom, and consequently that a nonsuit must be entered.

Postea to the Defendant.

Doe, on the joint and several demises of Thomas Herbert, James Southern, and Ann his Wife, and William Duke *v.* John Selby.

Testator devises his estates to his son *G.* "to hold to him my said son *G.* for and during the term of his natural life; and from and after his decease, I give and devise the same estates unto all and every the child and children of my said son *G.* lawfully to be begotten, and their heirs for ever, to hold as tenants in common, and not as joint tenants. But if my said son *G.* should die without issue, or leaving issue, and such child or children should die before attaining the age of twenty-one years, or without lawful issue, then I give and devise the same estates unto my son *T.* and my daughter *A.* and my son-in-law *D.* and their heirs for ever, to hold as tenants in common, and not as joint tenants." Upon testator's death, his son *G.* suffered a recovery, and died unmarried and without issue:—Held, that the devise over was a contingent remainder with a double aspect, and was defeated by the destruction of the particular estate by the recovery.

THIS was an ejectment for certain messuages and premises situate in the parish of *St. Leonard's Shoreditch*, in the county of *Middlesex*. The first count of the declaration was on the demise of *T. Herbert*, *J. Southern*, and *Ann* his wife, in her right, and *W. Duke*, for the entirety of the estate, and was laid on the 1st *January*, 1821. Three other counts were laid on the same day, on the demises of *T. Herbert*, *J. Southern*, and *Ann* his wife, in her right, and *W. Duke*, for an undivided third part of the premises, severally and respectively. Plea, Not guilty. At the trial before *Abbott*, C.J. at the Sittings in *Middlesex* after last *Easter* Term, a verdict was found for the plaintiff, subject to the opinion of the Court on the following case:—

Thomas Herbert, being seised in fee of the premises in question, made his will, duly executed and attested, so as to pass real estates, and devised as follows:—"I give and devise unto my said son *George Herbert*, two freehold houses in *Burdett's Buildings*, *Hoxton*, in the parish of *St.*

Leonard's Shoreditch aforesaid, in the occupation of *William Ames* and *Tabitha Kenner*; also, I give and devise, &c. (other premises mentioned in the will,) to hold to him my said son *George*, for and during the term of his natural life; and from and after his decease, I give and devise the same estates unto all and every the child and children of my said son *George*, lawfully to be begotten, and their heirs for ever, to hold as tenants in common, and not as joint tenants. But if my said son *George* should die without issue, or leaving issue, and such child or children should die before attaining the age of twenty-one years, or without lawful issue, then I give and devise the same estates unto my said son *Thomas*, my daughter *Ann Southern*, and my son-in-law *William Duke*, and their heirs for ever, to hold as tenants in common, and not as joint tenants." After the death of the testator, *G. Herbert* suffered a recovery to the use of himself in fee, and afterwards, by lease and release, conveyed the premises to the defendant in fee. In *January*, 1818, the said *G. Herbert* died unmarried, without having had issue, leaving the said *T. Herbert*, and *Ann Southern*, then and still the wife of the said *J. Southern* named in the said will, him surviving.

Chitty, for the lessors of the plaintiff. From the frame of this will, it is manifest that it was the intention of the testator to give his son *George* a life estate only; and if *George* should leave no children, or none who should attain the age of twenty-one years, and become capable of conveying away the estate or doing with it as they thought fit, then to give it over to the present lessors of the plaintiff, two of whom were as nearly related to him as *George*, and the others being his children by marriage. The testator never intended that *George* should have an absolute power of parting with the estate, and defeating the gift over; and unless the Court is restrained by some inflexible rule of law, it will give effect to his real intention. Probably it will be contended on the other side, that the remainder over

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was a contingency with a double aspect, and that by the destruction of the particular estate, the remainder over was defeated, according to *Loddington* v. *Kime* (a) and other cases of that class. Upon examination, however, it will be found that this is perfectly distinguishable from those cases. The argument in support of the plaintiff's right to recover is, that this was either an executory devise, or a vested remainder in the lessors of the plaintiff, defeasible only in the event of a son being born to *George* who should attain the age of twenty-one. In either view of the case, the destruction of *George's* life estate would not defeat the remainder, and consequently the plaintiffs are entitled to recover. Mr. *Fearne*, in his Essay on Contingent Remainders (b), after referring to instances of limitations after a preceding vested fee simple, says, "And even where there is a limitation after a devise in fee simple, though such antecedent devise in fee be not vested, but contingent; yet if the ulterior devise is limited so as to take effect in defeasance of the estate first devised, on an event subsequent to its becoming vested, it has been held to operate as an executory devise. Thus in *Gulliver* v. *Wickett* (c) the testator devised lands to his wife for life, and after her death to such child as she was then supposed to be enceinte with, and to the heirs of such child for ever; provided that if such child as should happen to be born should die before the age of twenty-one years, leaving no issue of its body, the reversion should go over. The Court held it to be a devise to the wife, remainder to the child in contingency in fee, with a devise over, which they held a good executory devise, as it was to commence within twenty-one years after a life in being; and that if the contingency of a child never happened, then the last remainder was to take effect upon the death of the wife." In the present case that rule of construction will apply. Here there is a devise to *George* for life, remainder to his children in *contingency* in fee, with a devise over; and therefore it is a good executory devise, as it is to commence within twenty-

(a) 1 Lev. 431. (b) 6th Ed. 396. (c) 1 Wils. 105.

one years after a life in being; and as the contingency of *George's* child never happened, then the last remainder took effect upon his death. The estate to *George's* children was a defeasible estate in fee, and not an absolute fee, because the words are, "but if my son *George* should die without issue, OR *leaving issue*, and such child or children should die before attaining the age of twenty-one years, or without lawful issue," then over. It is uncertain, therefore, whether they had a perfect estate, inasmuch as it is not until their attaining twenty-one, that such estate can become vested. The interposition of the words, "or leaving issue," makes all the difference between this and the cases which may be cited on the other side. [*Bayley*, J. If the word "*or*" be not read as "*and*," the remainder over will be too remote.] The case of *Gulliver* v. *Wickett* is similar to this in all its circumstances, and is an authority for shewing that this is an executory devise. [*Bayley*, J. Is not this case very like *Loddington* v. *Kime?*] That case was never finally decided, as appears by the case of *Gulliver* v. *Wickett* (*a*), and *Goodright* v. *Dunham* (*b*). If then this be an executory devise, and not a contingent remainder, it is perfectly clear that it cannot be defeated by the recovery suffered by *George*. But supposing it to be a contingent remainder, still if the contingency had happened, namely, that of *George* dying leaving a child, still if that child died under age, without issue, it is clear that the devise over would take effect. This circumstance shews, that this cannot be construed as a contingent remainder, but must operate as an executory devise. For this *Pells* v. *Brown* (*c*) and *Doe* d. *Smith* v. *Webber* (*d*), are also authorities. But again, it might be fairly argued, that the children of *George* would take only an estate tail, inasmuch as the devise is to them and their heirs for ever; but as the devise over is in the event of their dying without issue, their interest, according to *Doe* v. *Reason*, cited in *Doe* v. *Holmes* (*e*), would be

(*a*) 1 Wils. 105.
(*b*) 1 Doug. 264.
(*c*) Cro. Jac. 590.
(*d*) 1 B. & A. 713.
(*e*) 3 Wils. 244.

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reduced to an estate tail. The words, "unto all and every the child and children of my son *George*, and their heirs for ever," may be restrained by the subsequent words "if such children should die before attaining twenty-one, or without issue," so as to give them an estate tail only. At all events, as the ultimate remainder here is to uncles and aunts, it never could be said that the children died without heirs general as long as any of the uncles and aunts lived. They would be the heirs general, and would take in that character. This therefore distinguishes the present case from *Loddington* v. *Kime* and *Goodright* v. *Dunham*; and consequently, on either of these two grounds, first, that the estate is given to *George*'s children as an estate tail, in which view of the case the ultimate remainder would be vested in the plaintiffs; or second, that it is a contingent fee determinable, and the limitation over must take effect as an executory devise, the plaintiffs are entitled to judgment.

Campbell, contrà, was stopped by the Court.

Bayley, J.—Certainly a great deal of learning has been brought to bear on this case; but there being two decisions exactly in point, which have not been shaken in argument, we think it unnecessary to call upon the defendant's counsel. The cases of *Doe* d. *Davy* v. *Burnsall* (a) and *Crump* d. *Woolley* v. *Norwood* (b) are, in our opinion, decisive of the present question. This case arises upon a will, by which the property is given to the testator's son *George* for life, with remainder to all and every the child and children of *George*, and their heirs for ever, to hold as tenants in common, and not as joint tenants. It is not, and indeed it could not be contended, that *George* took an estate tail. On the contrary, it was very properly admitted by Mr. *Chitty*, that *George* took for life only. The case of *Goodright* v. *Dun-*

(a) 6 T. R. 30. (b) 7 Taunt. 362. S. C. 2 Marsh, 161.

him(a) clearly shews, that under the words of this will, he first takes an estate for life, and that his children, if there should be any, would take as purchasers by way of remainder in fee. But it is contended, that although *George* took for life, yet the plaintiffs, under the ultimate limitation, took either by way of executory devise or vested remainder. It is clear, however, that where a devise may operate by way of contingent remainder, it will not operate by way of executory devise, because the law as to executory devises applies only in those cases in which there can be no other operation. The rule, with reference to executory devises, which applies to these cases is, that you cannot limit a fee after a fee; and though there is a designatio personæ, so that it is a vested limitation, but provides that upon a given event the fee shall pass to some other person, it must operate by way of executory devise; but if the fee is limited in contingency, and it is upon the failure of that contingency that the fee over is limited, then the limitation over is a limitation, not by way of executory devise, but as a contingency with a double aspect; and if the estate vests in the one event, it will never vest in the other, as in *Loddington* v. *Kime*(b). There may, however, be a case of this description, namely, that upon a limitation over upon one or other of two events, the devise will operate as a contingent remainder if one event takes place, and as an executory devise if the other happens. For instance, if in this case *George* had had a son, there would have been a vested determinable estate in fee in that son, and the limitation over could only have operated by way of executory devise. The true way of reading this will is, to look at it as applied to the different contingencies. In the one, it is to operate by way of contingent remainder, and in the other as an executory devise. If *George* died without issue the first fee would never have vested, and then the remainder would continue a contingent remainder. Now *George* did die without issue, and therefore the remainders over would take

(a) 1 Doug. 261. (b) 3 Lev. 431.

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effect as in *Loddington* v. *Kime*, because then it would be a limitation to *George* for life, with remainder to his children in fee, if he had any, but if he had none, then over by way of remainder. But if *George* died leaving issue at the time of his death, the estate would not be absolutely vested in that issue, but would be a determinable fee. The fee would vest in the issue, but in the mean time it would be liable to be devested by the event of their dying before twenty-one, or without lawful issue. In that event it would operate as the limitation of a fee after a fee, and, therefore, if the limitation was to take place at all, it would be by way of executory devise. The case of *Gulliver* v. *Wickett* (a) was clearly an executory devise, because there the devise was to the testator's wife for life, with remainder to the child of which she was then supposed to be enceinte, and to the heirs of such child for ever; provided that if such child should die before twenty-one, leaving no issue of its body, then the remainder over. In that case there was a clear designatio personæ, inasmuch as a child in ventre sa mère is considered, for some purposes, as a person in esse, and therefore, if there was a vested remainder in that child, liable to be defeated by the event of its dying under twenty-one; that would be clearly the case of a fee limited after a fee. I have said that there are two cases bearing upon this question; Mr. *Chitty*'s industry has found a third, namely, *Doe* v. *Burnsall*, which, however, cannot, in my opinion, be distinguished from this. In that case the testator devised all his freehold and leasehold estates unto *Mary Oustwick* and the issue of her body, lawfully to be begotten, as tenants in common, if more than one; but in default of such issue, or being such, if they should all die under the age of twenty-one years, and without leaving lawful issue of any of their bodies, then over. *Mary Oustwick* having suffered a recovery, the point discussed was, whether she took an estate tail or not, and the Court decided that she did not take an estate tail, inasmuch as the

(a) 1 Wils. 105.

limitations over were contingent. Lord *Kenyon*, who was a very eminent lawyer upon all questions of real property, does not treat the case of *Loddington* v. *Kime* as a case never decided, (which Mr. *Chitty* suggests,) but at once says, "that brings the present case within that of *Loddington* v. *Kime*, which is the leading case upon this subject, and converts all the subsequent limitations into contingent remainders." In one event the estate, in that case, was to vest in the issue, if there were any, and in the other, it was to pass over, and therefore that also was a contingency with a double aspect. The question of executory devise was not raised there, nor indeed could it be, because *Mary Oustwick* died without having had any issue. If that question could be raised in this case, it might also have been in that; for though it might have escaped the counsel who argued that case to treat it as a case of executory devise, I think it is not probable that it would have eluded the discernment of Lord *Kenyon*, who was so extremely familiar with the law of contingent remainders. Then *Crump* v. *Norwood* (a) is in all points similar to the present case. There the devise was to the testator's wife for her life, if she should so long continue unmarried, and immediately after her decease, or future marriage, to his nephews *William*, *John*, and *Robert*, equally to be divided between them, share and share alike, during their respective natural lives, as tenants in common; and from and after their several and respective deceases, he devised his shares of him or them so dying to the heirs lawfully issuing of his and their body and bodies respectively, and if more than one, equally to be divided between them as tenants in common, and if but one, to such one only, and to his or their heirs and assigns for ever; "and if any of his said nephews should die leaving no such issue, or, leaving any such, they should all die without attaining the age of twenty-one, then over." The Court took time to consider of the case, and held that the limitation over, in the event of the nephews dying leav-

(a) 2 Marsh. 161. and 7 Taunt. 362.

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ing no issue, or leaving issue, who should all die under : was not an executory devise, but a contingent remainder with a double aspect; and *Gibbs*, C. J. who was a very eminent lawyer, and familiarly acquainted with the case of *Doe* v. *Burnsall*, considered that the question of executory devise did not arise, inasmuch as one of the nephews had died without issue, although if he had had issue, dying under twenty-one, the question might have arisen whether it would not have operated by way of executory devise. These authorities satisfy my mind, that this will cannot operate, upon the event which has happened, by way of executory devise. It is urged, however, that it might operate by way of vested remainder, on the ground that the limitation over to the lessors of the plaintiff is such a limitation as qualifies the devise to the children of *George*, and converts their estates into estates tail; because, as it is assumed, *George* never could be said to die without heirs general, so long as his brother or his sister were in esse. Now, in the first place, there is nothing in this case to shew, that these children were all by the same venter. If not, then the argument, supposing it otherwise had any weight, has no foundation. But I take this to be a clear rule of law, settled by the case of *Purefoy* v. *Rogers* (a), that although where an estate is given to a man and his heirs, and is then limited over to his collateral heirs, simpliciter, the limitation over to the collateral heirs will reduce the former estate to an estate tail, yet that is not the case where the limitation over to the collateral heirs is not simpliciter, but in default of the first takers. Therefore where an estate is only to go over to collateral heirs if the children die under twenty-one, and if the children survive twenty-one, the collateral heirs are never to take; that shews, that the children were not to take an estate tail, but an estate in fee. For these reasons I am of opinion, that *George Herbert* took for life only; that the limitation to his children, if he should have any, would have given those children a determinable fee; that the limitation

(a) 2 Saund. 380.

over upon the event which has happened, of *George* having no children, was a limitation, not by way of executory devise, but of a contingency with a double aspect, and *George*, having destroyed the particular estate upon which the ultimate remainders were to depend, destroyed those contingent remainders, and consequently the lessors of the plaintiff are not entitled to recover.

Holroyd, J.—I am also of opinion that the plaintiffs are not entitled to recover in the event which has happened. The testator gave to his son *George* an estate for his life, with a contingent remainder to such children as he should have, and their heirs, together with a contingent remainder, with a double aspect, to his son *Thomas*, his daughter *Ann*, and his son-in-law *William Duke*, upon the event of *George* having no issue. If there had been issue, and the issue had not attained twenty-one, then the limitation over might have operated as an executory devise, but that event has not happened. The limitation is expressly first to *George*, for life, then unto all the child and children of *George*, lawfully to be begotten, and their heirs for ever, to hold as tenants in common, and not as joint tenants. It is clear from these words, that the child or children would take an estate in fee, assuming that there was nothing else stated in the will. But the will goes on, "but if my said son *George* should die without issue," which I take not to refer to an indefinite failure of issue, but, coupled with what immediately follows, to refer to a dying without issue living *at his death;* for the will says, "or leaving issue, and such child or children should die before attaining the age of twenty-one years, or without lawful issue." Now unless we construe that passage of the will to refer to issue living at the time of the testator's death, the other case mentioned immediately afterwards could not happen; because if it meant "dying without issue at any period of time," the other contingency provided for, namely, the coming of age, could not take effect though he should die without issue living at the

time of the testator's decease. It is admitted that the words "*or* without lawful issue," must be read "*and* without lawful issue," so as to limit them to the time of the death of the children. It is argued, however, that in consequence of the limitation over being to persons who would be heirs-at-law, the children of *George* would take an estate tail, and consequently the children could not be said to die without heirs. But it is to be observed, that the limitation over is *not* given upon the regular determination of the preceding estate given to the children; it is given over upon the assumption that the children would take, but if they never did take, then the gift over could not take effect. Then it is argued, that assuming the gift over not to restrain the pre-existing estates so as to make them estates tail, then it would operate as an executory devise. The event, however, that has happened, clearly proves that this was not an executory devise, according to the cases of *Doe* v. *Burnsall* and *Crump* v. *Norwood*, in which case the observations of *Gibbs*, C. J. are expressly in point. In this case the estate is given over upon the happening of either of the two contingencies, one of which is *George*'s dying without issue living at his death. That event has happened, and but for the destruction of the particular estate, the remainder over would have taken effect as a contingent remainder; but inasmuch as the particular estate had been previously destroyed, that remainder was thereby defeated, and therefore the lessors of the plaintiffs have no right to recover.

Littledale, J.—The case of *Crump* v. *Norwood* is, in my opinion, not distinguishable from this. The only difference between the two cases is, that here the words are, "or without lawful issue," whereas the words there are, "or leaving any such;" but that makes no substantial difference. The case of *Doe* v. *Burnsall* is also in point, with this difference only, that there the words were, "if all such issue should die under twenty-one, *and* without issue." Here the word "*or*" is used; but I take it, that must be

read "*and*." It is true that in that case, the question whether the will would operate as an executory devise, was not brought under consideration; but in the case of *Crump* v. *Norwood*, where that question was agitated, *Gibbs*, C. J. mentions *Doe* v. *Burnsall*, and treats it as an express authority. I think these cases are quite decisive of the present, and that the lessors of the plaintiffs are not entitled to recover.

Judgment for the defendant.

Chitty afterwards, on a subsequent day in the Term, applied to have the case re-argued, or to have a new trial, upon a suggestion that it had been discovered that *Thomas Herbert* was heir-at-law of the testator; but the Court refused the application, leaving the parties to bring a fresh ejectment if they thought proper.

Thompson v. Macirone.

Friday, June 18.

After issue joined in assumpsit for goods sold, the plaintiff added a special count for not delivering a bill of exchange, and having recovered on that count only: Held, that the bail were discharged (*a*).

Where goods to the value of 144*l.* were made pursuant to order, but continued, by the desire of the vendee, upon the premises of the vendor, excepting a part, to the value of 2*l.* 10*s.* which the former took away: Held, that there was no delivery and acceptance of the goods within the meaning of the 17th sect. of the statute of frauds.

THE affidavit of debt in this case was for goods sold and delivered, upon which the defendant was held to bail, and bail above was put in and perfected. After issue joined, a special count was added for not delivering a bill of exchange. At the trial before *Abbott*, C. J. at the adjourned *Middlesex* Sittings, after last *Michaelmas* Term, it was proved that the defendant had given an order for the goods; that they were prepared according to his order; that they remained upon the plaintiff's premises by desire of the defendant; that they were reasonably worth the sum of 144*l.*; and that the defendant ultimately brought away a trifling part of them, amounting only in value to 2*l.* 10*s.*

(*a*) Vide *Caswell* v. *Coare*, 2 Taunt. 107. 1 Saund. 211. Cowp. 227. and *Edge* v. *Frost*, ante, 243.

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The defendant had agreed to give a bill of exchange for the amount of the goods, but never did so; and the plaintiff obtained a verdict, upon the special count, for 144*l*.

Scarlett having, in the course of last Term, obtained a rule nisi for entering an exoneretur on the bail-piece, on the ground that the plaintiff had obtained a verdict upon the special count only, and therefore that the bail were discharged,

Marryatt and *Nicholl* now shewed cause. The evidence at the trial was sufficient to warrant a general verdict for the plaintiff; and if so, there is no ground for this motion. The defendant actually took part of the goods away, and the residue remained in the possession of the plaintiff by the desire of the defendant. There was therefore a delivery and acceptance of the goods within the meaning of the 17th sect. of the statute of frauds; for a delivery and acceptance of part, in the name of the whole, is sufficient. These, therefore, were goods sold and delivered, so as to support the affidavit of debt; for the vendor had, by parting with some of them, enabled the vendee to take possession of the whole whenever he chose so to do; which it was held by *Holroyd*, J. in the case of *Smith* v. *Chance* (a), entitled him to maintain the action for goods sold and delivered.

ABBOTT, C. J.—It is quite clear that there was not a delivery and acceptance of these goods within the meaning of the statute. The buyer, it is true, gets possession of a small part, but he could not obtain the remainder without paying the value, or giving security for it; and it was plain, upon the evidence, that the plaintiff never intended to give possession until he had received either his money or sufficient security for it.

BAYLEY, J.—I am of the same opinion. We cannot, on

(a) 2 B. & A. 755.

the present motion, inquire upon the merits, whether there was or was not originally a good ground for holding the defendant to bail. But bail above are not liable unless the plaintiff recovers upon the same cause of action which is disclosed in the affidavit of debt. Here he did not, for the affidavit of debt is for goods sold, and the verdict is obtained upon a special count for not delivering a bill of exchange. The bail, therefore, are exonerated, and this rule ought to be made absolute. With respect to the statute of frauds, it is plain that there was no delivery and acceptance here within the meaning of the 17th section, for the vendee got possession of a very small part only, and was not permitted, nor had any right to take the rest, until he paid, or gave security for, the value of the whole.

Rule absolute (*a*).

(*a*) See *Wheelright* v. *Jutting*, 1 J. B. Moore, 51. 7 Taunt. 304. S.C. and *Baldey* v. *Parker*, ante, vol. iii. 220.

BURWOOD v. FELTON.

Saturday, June 19.

An assignee of a bankrupt is not liable, under the 5 *G.* 2. c. 30. s. 25. to repay the messenger under the commission, the costs incurred by him previous to the appointment of the assignee.

ASSUMPSIT for work and labour, with the money counts. Plea, non assumpsit, and issue thereon. At the trial before *Abbott*, C. J., at the adjourned *Middlesex* Sittings, after last *Michaelmas* Term, the facts of the case were these: The plaintiff was messenger, and the defendant sole assignee, under a commission of bankrupt, which had issued against one *Farquharson*. The plaintiff claimed of the defendant two sums, of 85*l*. and 28*l*. for fees due to him as messenger; the former having become due before, and the latter after the appointment of the defendant as assignee; and which latter sum the defendant had paid into Court. It was objected for the defendant, that upon the true construction of the statute 5 *Geo.* 2. c. 30. s. 25. the assignee of a bankrupt was not liable to repay the messenger any costs incurred by him previous to the appointment of assig-

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nees, inasmuch as that statute provided that the petitioning creditor should pay all the costs and charges of suing out and prosecuting the commission up to the period when the assignees are chosen; and consequently that he was the party personally liable to the messenger, and not the defendant, who was the assignee. The learned Judge reserved the point; and the jury, under his direction, found a verdict for the plaintiff, the defendant having liberty to move the Court to enter a nonsuit (a).

Marryatt, in *Hilary* Term last, having obtained a rule nisi accordingly,

Scarlett and *Archbold* now shewed cause. The true construction of the statute is this; so long as there are no assets in the hands of the assignees, they are not liable for the expenses attending the commission, and those expenses must be borne by the petitioning creditor; but so soon as the assignees have assets, they are liable, by relation back to the date of the commission, even for those expenses which have been incurred previous to their appointment. [*Abbott*, C. J. Is not the petitioning creditor liable at all events for the messenger's fees?] Certainly; but the assignees are liable over to him, and therefore to compel the messenger to sue the petitioning creditor, would be to lead to a circuity of action. The messenger is a creditor of the bankrupt's estate, and the funds which pass into the hands of the assignee are money had and received to his use;

(a) Another point raised at the trial was this: A letter from the defendant's attorney to the plaintiff's attorney was read, which, it was contended, contained an express promise to pay the sum now claimed, so soon as sufficient funds for that purpose should reach the defendant's hands. The Chief Justice, at the trial, and the whole Court ultimately, was of opinion that the letter did not amount to any such promise; but as the argument and decision depended altogether upon the language of the letter, it was not thought necessary to insert them in the report of the case.

and *Cooper* v. *Wrench* (*a*) seems to have decided, that under such circumstances, an action for money had and received may be maintained against the assignees of a bankrupt. Besides, here the defendant, after he had been appointed assignee, thought proper to continue the plaintiff in his employment under the commission; and that act raises in him a common law liability to pay the plaintiff for the whole fo the work done by him. *Tarn* v. *Heys* (*b*), *Phillips* v. *Dicas* (*c*).

Marryatt, contrà. Ex parte *Hartop* (*d*) is a decisive answer to the point last raised, and is an express authority to shew, that the employment of the messenger by the assignees, after their appointment, does not render them liable for the expenses incurred before that time. With respect to the statute, it specifically provides that the petitioning creditor shall be personally liable for all costs up to the time of the choice of assignees; and the plain intention of such a provision was, that, with respect to such costs, no liability should attach upon the assignees.

ABBOTT, C. J.—This rule must be made absolute. The 25th section of the 5 *Geo.* 2. c. 30. enacts, "That the creditor or creditors who shall petition for and obtain any commission of bankrupt, shall be, and is and are hereby obliged, at his, her, or their own costs and expenses, to sue forth and prosecute the same, until an assignee or assignees shall be chosen of such bankrupt's estate and effects; and the commissioners to be named in any such commission shall, at the same meeting which shall be appointed for the choice of the assignees, ascertain such costs; and by writing under their hands shall direct and order the assignee or assignees of such bankrupt's estate, who is and are hereby required to pay and reimburse such petitioning creditor or creditors such his, her, or their costs and charges

(*a*) Ante, vol. i. 482.
(*b*) 1 Stark. 278.
(*c*) 15 East, 248.
(*d*) 9 Ves. jun. 109.

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as aforesaid, out of the first monies or effects of the said bankrupt that shall be got in and received under the said commission." It is perfectly plain, therefore, that by law, an assignee is not liable to pay the messenger the expenses incurred by him previous to the appointment of such assignee. It is equally clear, that by law the petitioning creditor is liable to pay those expenses; and the very statute which renders him so liable, provides also a mode in which he is to be reimbursed. I am therefore of opinion, that the defendant is not liable to pay the plaintiff the expenses incurred by him as messenger before the appointment of the former as assignee; and, consequently, that the rule for entering a nonsuit in this case must be made absolute.

The other Judges concurred.

Rule absolute.

Saturday, June 19.

STODDART v. PALLMER, Esq.

Declaration in case for a false return to a writ of *fi. fa.* stated, "that plaintiff, in *Trinity* Term 2 *G.* 4. by the judgment recovered, &c. prout patet per recordum," the evidence being of a judgment in *Easter* Term 3 *G.* 4.:— Held, not a fatal variance; for the averment, "prout patet per recordum," was unnecessary, and might be rejected as surplusage, because the judgment itself was mere inducement, and not the foundation of the action (*a*).

IN case against the late Sheriff of the county of *Surrey*, for a false return of nulla bona to a writ of fieri facias, the declaration stated, that plaintiff, in *Trinity* Term in the *second* year of our Lord the now King, in the Court of our said Lord the King, &c. by the consideration and judgment of the Court, recovered, &c. prout patet per recordum. Plea, not guilty, and issue thereon. At the trial before *Abbott*, C. J., at the adjourned *Middlesex* Sittings after last *Michaelmas* Term, the record of the judgment being produced, it appeared that the costs were taxed on the postea in *Easter* Term in the *third* year of the King, and an objection being taken that this was a fatal variance, the Lord Chief Justice was of that opinion, and accordingly nonsuited the plaintiff. A rule nisi being afterwards obtained to set aside the nonsuit,

(*a*) See *Jervis* v. *Sidney*, ante, vol. iii. 483. and *Draper* v. *Garratt*, id. 426.

Marryat now shewed cause. The plaintiff has set out a judgment in his declaration, and has concluded prout patet per recordum. That is matter of description, essential to his cause of action, and therefore he was bound to give evidence of a judgment exactly corresponding in all its parts with that put upon the record. *Pope* v. *Foster* (a). [*Abbott*, C. J. That case has been repeatedly overruled. Is not the recent case of *Phillips* v. *Shaw* (b) decisive against this objection?] That case was decided upon the authority of *Purcell* v. *Macnamara* (c), in which, undoubtedly, *Pope* v. *Foster* was overruled; but in both those cases an important distinction was taken, within which the present will come. In the former Lord *Ellenborough* said, "There are two sorts of allegations; the one of matter of substance, which must be substantially proved; the other of description, which must be literally proved:" and in the latter, *Abbott*, C. J., referring to that very distinction, says, "the allegation in the declaration being of a substantial matter, and not being a description of the record of acquittal, was well supported by the proof;" and then proceeds to give judgment upon the same principle. Now the allegation here is matter of description, and therefore ought to have been proved literally. Again, in *Purcell* v. *Macnamara* it was said by *Lawrence*, J., "Where the day laid is made part of the description of the instrument referred to, the day laid must be proved as part of that instrument;" and if that rule is applicable to a particular day, it must equally apply to a particular Term. In the present case every count of the declaration concludes with a prout patet per recordum, but in *Phillips* v. *Shaw* that was omitted in the count on which the verdict was taken. There it was not necessary to set out the judgment; but here the judgment was the very foundation of the action, and it was indispensably necessary to set it out; and if so, it was equally necessary to set it out correctly to the letter. [*Bayley*, J. I cannot agree that it was not necessary in *Phillips* v. *Shaw* to set out the judgment; the

(a) 4 T. R. 590. (b) 4 B. & A. 435. (c) 9 East, 157.

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only distinction between that case and the present, is the omission there of the prout patet per recordum.]

Scarlett, contrà. The averment of prout patet per recordum in this case was unnecessary; it is therefore an immaterial averment, and need not be proved at all. All that the plaintiff was bound to do, in order to maintain his action, was to shew that he had recovered a judgment; but in what Term he recovered it was quite immaterial, and need not have been averred. The judgment is merely matter of inducement, for the false return is the foundation of the action; the allegation, therefore, was superfluous, and may be rejected altogether as surplusage. The plaintiff has a good cause of action without it, upon the face of his declaration, and consequently he was under no obligation to prove a judgment precisely and literally the same with that which he put upon the record.

ABBOTT, C. J.—I am not prepared to say that the ancient rule upon this subject, which was followed in the case of *Pope* v. *Foster*, was not founded in wisdom and propriety, or, that we have effected an improvement in modern times by deviating from that rule; for, certainly, some of the recent decisions on this point have a tendency to break in upon the nicety and precision of special pleading. But the distinction between allegations which are matter of substance, and allegations which are matter of description, namely, that the former may be proved substantially, but the latter must be proved literally, is now thoroughly established. It was laid down by this Court in *Purcell* v. *Macnamara*, and was recognised and adopted in *Phillips* v. *Shaw*; and therefore we are bound to act upon it. Then, if the allegation here, "that the plaintiff by the judgment of the Court recovered," &c. is matter of substance only, proof of any judgment that would warrant the writ is sufficient; if it is matter of description, proof of a judgment similar in its date and all its other features, or rather literally the same,

with that set out in the declaration, was requisite. It is argued that the conclusion, prout patet per recordum, constitutes this allegation matter of description; that the declaration in *Purcell* v. *Macnamara*, and the count upon which the verdict was taken in *Phillips* v. *Shaw*, contained no such averment; and that Lord *Ellenborough* in the former of those cases seemed to be of opinion, that the introduction of such an averment would have rendered the allegation descriptive, and that such a variance would have been fatal. I am, however, of opinion, upon the best consideration I can give the point, that no such effect is produced by the introduction of this averment, and that in the present case it is altogether immaterial. It seems to be an unnecessary allegation, and that being so, it may be rejected as surplusage, and that, consequently, that proof which, if it were a material allegation, would be necessary, was not required in this case. For these reasons I am of opinion that there was not a fatal variance in this case, and therefore that the rule for setting aside the nonsuit must be made absolute.

Bayley, J.—I am of the same opinion. It seems to me that the judgment in this case was insisted upon merely as matter of inducement, and not as the foundation of the action, and therefore that there was no necessity for concluding with the averment prout patet per recordum. That part of the declaration, therefore, which gives rise to the variance may be rejected as surplusage, and then the present case is not distinguishable from *Phillips* v. *Shaw*, and must be governed by it.

Holroyd, J., concurred.

Littledale, J.—This case comes within the rule laid down in *Co. Lit.* 303. a., where it is said, " Where a matter of record is the foundation or ground of the suit of the plaintiff, or of the substance of the plea, there it ought to be certainly and truly alleged; otherwise it is, where it is but

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conveyance." "That which is alleged by way of conveyance, or inducement, to the substance of the matter, need not to be so certainly alleged, as that which is the substance itself." And that rule was acted upon in *Waites* v. *Briggs*(a), where it was said, "per *Holt*, C. J., In debt on a judgment quod cum recuperasset is good without a prout patet per recordum; and the defendant may plead nul tiel record. Et per *G. Eyre*, J. The matter here is grounded on the fact, for nil debet is a good plea, and not on the matter of record. And the rule in *Co. Litt.* 303, where the difference is taken between cases, where the record is the very foundation, and where inducement, is a good diversity." That was an action of debt for an escape, and the Court held that the commitment was only inducement, and that a prout patet per recordum was unnecessary. The same principle was also acted upon with respect to bonds in *Cromwell* v. *Grunsden* (b), and in other cases which might be mentioned. In this case, therefore, the judgment being mere inducement, did not require the prout patet per recordum, and not being the foundation of the action, strict proof of its contents was not necessary.

Rule absolute (c).

(a) 2 Salk. 565. (b) 2 Salk. 462.
(c) Vide *Draper* v. *Garratt*, ante, vol. iii. 226.

Saturday, June 19.

SKINNER v. BUCKEE.

An overseer supplying coals to the poor of his parish in the name of another person, but without any view to his *own profit*, is not liable to the penalties of 55 *G.* 3. c. 137. s. 6.

DEBT upon the statute 55 *G.* 3. c. 137. for penalties. The first count charged, that defendant, on, &c. was overseer of the poor of the liberty of *Saffron Hill, Hatton Garden*, and *Ely Rents*, in the county of *Middlesex*, duly appointed in that behalf, to wit, at &c., and that during the time he retained such appointment as aforesaid, to wit, on &c. he did, in his own name, provide, furnish and supply certain

goods, to wit, coals, for the use of the workhouse belonging to the said liberty for which he was so appointed, to wit, at, &c. contrary to the form of the statute, &c., by means whereof, &c. Second count, that defendant did, in the name of a certain other person, provide, &c. for defendant's own profit, coals, for the use of the workhouse, &c. Third count, that defendant was indirectly concerned in providing, &c. for defendant's own profit, coals, &c. Fourth count, that defendant was directly concerned in providing, &c. coals, &c.; but not stating for defendant's own profit. Fifth count, that defendant was indirectly concerned in providing, &c. coals, &c. Sixth count, that defendant was concerned in a certain contract relating to the providing, &c. goods, materials and provisions for the use of the workhouse. At the trial, before *Abbott*, C. J., at the adjourned *Middlesex* Sittings, after last *Michaelmas* Term, it was proved that the defendant, being a coal-merchant, and having been duly appointed overseer of the poor of the liberty in question, while he continued overseer a quantity of coals was supplied to the workhouse in the name of one *Gaubert*, a brother-in-law of the defendant, and in which the defendant had an interest. There was, however, no direct evidence to shew that either *Gaubert* or the defendant had realised a profit from the coals, and the learned Judge, being of opinion that, unless the defendant had supplied the goods with the intention of obtaining a profit upon them, the case was not within the statute, directed the jury to find their verdict for the defendant, if they were satisfied upon the evidence that he had not supplied the coals with the intention of obtaining a profit upon them. The Jury found for the defendant.

Gurney, in *Hilary* Term last, obtained a rule nisi for a new trial, upon the ground that the learned Judge had misdirected the Jury in point of law, against which

Scarlett now shewed cause. This case depended upon the construction of the sixth section of the statute. Unless

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that clause comprehends within its prohibition the buyer as well as the seller of goods supplied to the poor, and the person who supplies with profit as well as him who supplies without, it does not affect this defendant. Now it cannot bear such a construction. The words, "for his own profit," though they are not repeated in the second branch of the section, are evidently intended to apply to every part of it. If, therefore, the defendant had supplied the coals, whether in his own name, or in that of any other person, at their original cost, it is perfectly clear that he would not have been liable under this act, because he would not then have supplied them "for his own profit." Then, neither is he liable for being concerned indirectly or directly in a contract for the supply of coals by another, if he derives no profit from the transaction; for it would be absurd to suppose that the legislature intended to subject a person to a penalty for being concerned with another, directly or indirectly, in the very act, which it is evident he may do in his own person without incurring any responsibility.

Gurney, contrà. The clause in question creates two offences: first, the supplying provisions for the use of the poor, either in the name of the overseer, or of any other person; which must be done with a view to profit, for there the words "for his own profit" are inserted; and second, the being concerned, directly or indirectly, in supplying provisions, or in any contract relating thereto; which need not be done with a view to profit, for there the words "for his own profit" are omitted. What was the object of the legislature in thus varying the language of the act? Clearly this. That although a person who supplied provisions openly, either in his own name or that of another, without profit, might legally do so; yet that he who was secretly concerned in supplying provisions, or in any contract for that purpose, might be liable under the statute, even though he acted without a view to profit, as having had recourse to a species of conduct which, to say the least of it, is extremely suspicious.

Abbott, C. J.—This is purely a question of law arising upon the construction of the sixth section of that very wholesome act of parliament, the 55 *G.* 3. c. 137. That section enacts, "that no churchwarden or overseer of the poor, either in his own name, or in the name of any other person or persons, shall provide, furnish, or supply, *for his or their own profit*, any goods, materials, or provisions, for the use of any workhouse, or otherwise, for the support or maintenance of the poor in any parish or place for which he shall be appointed such churchwarden or overseer, during the time which he shall retain such appointment, nor shall be concerned directly or indirectly in furnishing or supplying the same, or in any contract or contracts relating thereto, under the penalty of 100*l.*" Now, it is perfectly clear, upon the authority of *Gibbs*, C. J., in the case of *Pope* v. *Backhouse* (*a*), that if the defendant himself, while overseer, had supplied all the provisions consumed in the workhouse, at their original cost, and without any view to profit, he would have committed no offence within the letter or the spirit of this section. Then, if an overseer, supplying the poor of his parish, in his own name, and to the extent I have imagined, would not be liable under the statute, because he gained no profit by the supply; can it be argued that the same person, by being concerned directly or indirectly in supplying a small quantity of provisions, in the name of another, without profit, would be liable? I think not; such a result would involve a manifest and absurd contradiction in the act of parliament itself. It seems to me, therefore, that the words, "for his own profit," must be understood as applying to the whole of this section, and that all that the legislature had in contemplation, was, that no overseer for his own profit should supply any provisions to the poor, either in his own or any other person's name, or be concerned directly or indirectly in any contract made for that purpose. In this view of the statute it is plain that the defendant has not acted so as to have brought himself within its operation,

(*a*) J. B. Moore, 186. 8 Taunt. 248. S. C.

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and therefore the verdict was right, and this rule must be discharged.

The other Judges concurred.

Rule discharged.

Monday, June 21.

Paying money into Court upon assumpsit for goods sold and delivered, does not deprive the defendant of the benefit of the statute of limitations as to the residue of plaintiff's demand.

LONG *v.* GREVILLE, Esq.

ASSUMPSIT for goods sold and delivered to the amount of 13*l.* 16*s.* 6*d.* The defendant paid into Court, generally, the sum of 2*l.* 12*s.* 6*d.*; and pleaded, first, the general issue, non assumpsit; and second, non assumpsit infra sex annos; whereupon issue was joined. At the trial before *Abbott*, C. J. at the adjourned *Middlesex* Sittings, after last *Michaelmas* Term, the case was this: In the year 1813, the defendant had ordered of the plaintiff, an hotel and tavern keeper, a small quantity of wine, amounting to 2*l.* 12*s.* 6*d.*, the amount paid into Court. He had also dined occasionally at his house, in company with other persons, and the residue of the plaintiff's demand consisted of the defendant's share of the expenses so incurred, and none of which had ever been paid. In the year 1814, the defendant quitted *England*, and did not return till the close of the year 1819. In *May*, 1822, a servant of the plaintiff called upon the defendant, and presented him with a bill to the whole amount claimed by the action. The defendant looked at the bill, but declined paying it, alleging that he had dined at the plaintiff's hotel as an invited guest, but desired to have a further bill, containing the names of all the parties, and the total amount incurred. Upon such a bill being afterwards presented to him, he repeated that he had always been present by invitation, and refused altogether to pay the plaintiff's demand. It was in evidence, that when the defendant dined at the plaintiff's hotel, the bill was taken into the room to the company at the close of the evening; but whether it ever got into the hands of the defendant, did not ap-

pear. It was objected, for the defendant, that there was no evidence of any such acknowledgment of the debt by him as would take the case out of the statute of limitations, and therefore that the plaintiff must be nonsuited. The learned Judge declined to nonsuit, but reserved the point. He then left it to the jury to say, whether at the dinner parties at which the defendant was present, the latter had expressly or impliedly given his consent to pay his share of the bill; whether he, in fact, was present as a guest, or upon his own responsibility; and whether the witness was correct in stating that the bill was taken into the room on each occasion, because, if he was, that would go far to shew that the defendant considered himself as liable for his share of the dinner bills. The jury found a verdict for the plaintiff, the defendant having liberty to move to enter a nonsuit.

Denman, C. S. in *Hilary* Term last, moved accordingly, and obtained a rule nisi, against which

Gurney and *Claridge* now shewed cause. Even if the language of the defendant is not a sufficient acknowledgment of a still existing debt to take the case out of the statute, which, however, it is contended it clearly is, still the defendant, by paying money into Court, generally, upon the whole declaration, has admitted the contract stated in the declaration, and precluded himself from objecting to any part of the amount claimed. This seems to have been decided in *Stoveld* v. *Brewin* (a) and *Dyer* v. *Ashton* (b). The only point in doubt, therefore, was, the sum really due, and that was left to the jury, who by their verdict have found that the whole amount claimed by the plaintiff is due to him, and that finding concludes the defendant.

Denman, contrà, was stopt by the Court.

ABBOTT, C. J.—If we were to hold that the payment of

(a) 2 B. & A. 116. (b) Ante, vol. ii. 19.

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money into Court in this case deprived the defendant of the benefit which he seeks under his plea of the statute of limitations, we should be going much farther than any case upon this subject has hitherto gone, and than we are warranted by any sound construction of law to go. The utmost effect of that payment is, to admit that the sum so paid is due; and to that extent it concludes the defendant, but to that only. With respect to the supposed acknowledgment of the defendant, it appears to me to be none at all; on the contrary, it is a denial of the existence of the debt, and a refusal to pay it. I am therefore of opinion, that the rule for entering a nonsuit ought to be made absolute.

Bayley, J.—In order to take a case out of the statute of limitations by way of acknowledgment, the acknowledgment must go the whole length of admitting that the debt is actually due from the defendant to the plaintiff; but taking the whole of the evidence in this case together, it is impossible to say that the language of the defendant can bear such a construction. He says, "I am not liable to pay any thing; I was an invited guest." That point, therefore, is clearly against the plaintiff. As to the payment of money into Court, it has certainly been held to be an admission of the contract set out in the declaration; but that has been where there was a special contract between the parties. Here there is no special contract set out; the plaintiff relies only upon an implied assumpsit; therefore the defendant, by paying 2*l*. 12*s*. 6*d*. into Court, has admitted that he owes that sum; but that very admission being limited to a part of the amount claimed, is a denial as to the rest; and it would be too much to say, that an admission as to one part, and a denial as to the rest, will afford an inference that the whole is due.

Holroyd, J. was of the same opinion; and added, that the same principle had recently been laid down with re-

spect to a plea of tender in the case *Simpson* v. *Routh* (*a*), where it was held, that "a tender does not confer upon the plaintiff a right of action for a larger sum than that actually tendered, and cannot be construed as an admission of a debt due beyond that sum."

LITTLEDALE, J.—The payment of money into Court only admits the defendant's liability to that amount. It does not make him liable for the whole.

Rule absolute.

(*a*) Ante, 181.

STANWAY *v.* HISLOP.

Monday, June 21.

The venue in an action upon an award will not be changed in this Court.

ACTION upon an award. On shewing cause against a rule for discharging the rule to change the venue from *London* to *Lancashire*, the question was, whether the venue could be changed, in an action upon an award, from the county in which it was originally laid.

Parke, in support of the present rule, cited *Whitburn* v. *Staines* (*a*), where it was expressly held in C. P. that the venue could not be changed in an action upon an award. He also referred to *Morris* v. *Hurry* (*b*), where the same Court would not allow the venue to be changed in an action on a charter-party of affreightment.

Patteson, contrà, said, that in *Greenway* v. *Carrington* (*c*), the propriety of the decision in *Whitburn* v. *Staines* was doubted as a general proposition; and certainly in this Court it had never yet been decided that the venue could not be changed in an action upon an award. It is every day's practice to change the venue in an action on a policy of in-

(*a*) 2 B. & P. 355. (*b*) 1 J. B. Moore, 54. 7 Taunt. 306. S. C.
(*c*) 7 Price, 564.

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surance (a); and there seems no good reason why the like practice should not govern in an action upon an award.

ABBOTT, C. J.—It is very desirable that the practice of this Court should conform as nearly as possible with that of the Common Pleas. Now there is an express decision in that Court, and none adverse to it in this, that the venue cannot be changed in an action upon an award. There are, however, decisions in this Court which seem to me to be precisely similar in principle to the case of an award. This Court will not change the venue in debt on bond or other specialty; for debitum et contractus sunt nullius loci; and bonds or other specialties are bona nótabilia wherever they happen to be (b). An award is similar to a judgment, and falls within the rule laid down as to bonds. The venue may still be changed in an action upon a policy of insurance, but that is where the instrument is not by deed. There being no decision to the contrary in this Court, we think it is desirable to conform to the rule of practice laid down by the Common Pleas.

BAYLEY, HOLROYD, and LITTLEDALE, Js. concurred.

Rule absolute, without costs (c).

(a) Andr. 66. 2 Str. 1180. Say. Rep. 7. 2 T. R. 275. and 7 T. R. 205.

(b) 1 T. R. 571.

(c) Vide Tidd, 8 Ed. 653. and 2 Archbold's Prac. 176.

Monday, June 21.

PEERS v. SAMPSON.

Where *A.* hired a room in the house of *B.* at 2*s.* per week, for the purpose of depositing goods for safety, and kept the key of a padlock by which the room door was fastened, and the goods were stolen by one of *B.*'s family: Held, that *B.* could not be sued as bailee for the value of the goods stolen.

DECLARATION in case stated, that heretofore, to wit, on &c. at &c. plaintiff caused to be delivered to defendant certain goods and chattels (enumerating them) of great value, to be by defendant safely and securely kept and taken

care of by defendant for plaintiff, for certain reasonable reward to be therefore paid to defendant in that behalf; and defendant then and there had and received the said goods and chattels into his care, custody, and possession, for the purpose aforesaid; and it thereupon became and was the duty of defendant to take due and proper care of the said goods and chattels for plaintiff; yet defendant, not regarding his duty in that behalf, afterwards, to wit, on &c. at &c. by himself and his servants, in that behalf conducted himself so carelessly, negligently, and improperly, in and about the keeping and taking care of the said goods and chattels, that by and through the mere negligence and improper conduct of defendant and his servants in that behalf, the said goods and chattels became and were wholly lost to plaintiff. Second count in trover. Plea, not guilty, and issue thereon. At the trial before *Abbott*, C. J. at the adjourned *Middlesex* Sittings, after last *Michaelmas* Term, the case proved on the part of the plaintiff was this: In the year 1816, the plaintiff agreed with the defendant that the articles in question should be deposited in a room in his house, for which she was to pay him two shillings per week. The door of the room was fastened with a padlock, of which the plaintiff, or her agent, always kept the key. The two shillings per week were regularly paid, and the goods continued safe down to the close of the year 1821, when the room was forced open, and the whole of the property stolen, by a person in the defendant's family; no suspicion of any connivance at, or participation in the robbery, ever attached to the defendant himself. For the defendant two objections were taken; first, that the goods never had been delivered into his custody so as to constitute him the bailee of the plaintiff; and second, that if they had, still, as the loss had been brought about by robbery, the defendant was not liable; and upon these grounds it was contended, that the plaintiff must be nonsuited. The learned Judge declined directing a nonsuit, but reserved both points, and the plaintiff had a verdict—damages 150*l.*; with liberty to the defendant to move to enter a nonsuit.

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Denman, C. S. in *Hilary* Term last, moved accordingly, and obtained a rule nisi upon both points; against which

Marryat and *Chitty* now shewed cause. The defendant was a bailee in the full sense of the word, therefore the general law respecting bailees applies to him, and he is liable in this action. The plaintiff regularly paid rent for the keep of the goods, and the defendant received them on that condition. That fact of itself constitutes the defendant a bailee. Even where the bailee receives no reward, he is not exempt from liability, *Southcott's* case (*a*); where it was held, that a general delivery, without reward, will charge the bailee to answer for the goods if they are stolen; because there is no difference between a special acceptance to keep safely, and an acceptance generally to keep. The principles laid down in that case have indeed been considerably qualified by the subsequent case of *Coggs* v. *Bernard* (*b*), as far as respects the absence of reward to the bailee; but that is unimportant to the present case, because here the defendant received two shillings a week as a consideration for his safe custody of the goods. Some later cases have decided, that a bailee, for reward, is bound not only to protect the property entrusted to him against ordinary hazards, but also to exert himself to preserve it from any unexpected and extraordinary dangers to which it may become exposed. *Leck* v. *Maestaer* (*c*). It may perhaps be admitted, that where the loss is occasioned by a robbery committed by force and violence, no bailee can be held liable; but that exception does not apply here, because the robbery in this case was such as might have been prevented by due diligence and caution. [*Bayley*, J. Is there any case which distinguishes between robberies by violence and robberies without violence, in their effect upon the liability of bailees?] That distinction appears to have been taken by Lord *Holt* in the course of his elaborate judgment in *Coggs* v. *Bernard*;

(*a*) 4 Rep. 83. Cro. El. 815. S. C.
(*b*) 2 Ld. Ray. 909.
(*c*) 1 Camp. 138.

and it is also recognized in the more recent case of *Sutton* v. *Clarke* (*a*). Another distinction has also been taken upon this point, which is applicable to the present case, namely, that where the robbery is committed by an individual connected with the family of the bailee, he is liable, because in such a case due diligence and caution cannot have been used. *Clarke* v. *Earnshaw* (*b*). [*Bayley*, J. Suppose these goods had been destroyed by fire; would the defendant have been liable at all events?] By the common law undoubtedly he would. It was urged at the trial, that the custody of the goods continued in the plaintiff, and therefore the defendant could not be considered as a bailee at all. But, in the first place, the payment of the two shillings weekly, which was in the nature of a premium for the insurance of the goods, clearly made him a bailee, and liable; and, secondly, the interference of the plaintiff in keeping the key did not remove or alter his liability; for it was held in *Robinson* v. *Dunmore* (*c*), that where a person undertakes to carry goods safely and securely, he is responsible for the damage they sustain in the carriage through his neglect, though he is not a common carrier, nor has any reward, and although the plaintiff, for greater caution, sends his servant with the goods, who pays a person for guarding them, because he apprehends danger of their being stolen.

Denman, C. S. and *Comyn*, contrà, were stopt by the Court.

ABBOTT, C. J.—I am of opinion that a nonsuit must be entered in this case. The averments in the declaration are not proved, and therefore the plaintiff has not made out her case. The averments are, that the goods were delivered to the defendant, to be by him safely and securely kept and taken care of for the plaintiff, for reasonable reward, to be therefore paid to the defendant; and that the defendant re-

(*a*) 6 Taunt. 229. 1 Marsh. 429. S. C. (*b*) 1 Gow. 30.
(*c*) 2 Bos. & Pul. 416.

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ceived the goods into his care, custody, and possession. The evidence is, that the goods never were delivered to the defendant; that he never received them or had the custody of them; that the reward was paid to him not for the custody of the goods, but for the hire of the room in which they were deposited; and that the key of that room was constantly kept by the plaintiff, or her agent. The defendant, therefore, had no control over the goods; he could not enter the room where they lay, for the purpose of seeing whether they were safe, for he had no right by law, and no power, in fact, so to do. Under such circumstances, it is impossible to hold the defendant liable as a bailee of any kind; and as the plaintiff has failed in supporting the declaration by the necessary evidence, she cannot maintain the action.

BAYLEY, J.—The goods were never put into the possession or custody of the defendant, so as to render him responsible in the character of a bailee; but if they had been, still there is no evidence of any warranty by him upon which an action can be maintained against him, and without that, this action will not lie, because there is no proof of gross negligence, nor indeed of any negligence, on his part. The plaintiff and defendant seem to me to have filled the relative situations of landlord and tenant of the room, without any reference to a bailment of the goods; and, consequently, I am clearly of opinion, that this action cannot be supported.

HOLROYD, J.—I think there was not sufficient negligence to charge the defendant; but the objection to the form of the declaration is quite decisive, because it is perfectly clear that the defendant was never in possession of the goods.

LITTLEDALE, J. concurred.

Rule absolute for entering a nonsuit (a).

(a) Vide 2 Str. 1099. 1 Esp. 315. 1 H. Bl. 158. and ante, vol. iii. 211.

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JAMES de POURTALES GORGIER v. ANDREW AMEDIE MIEVILLE and LEWIS ANDREW de la CHAUMETTE.

Tuesday, June 22.

Where the holder of *Prussian* bonds, issued by the Sovereign of that country, to secure the payment of a national loan, deposited them with an agent for a special purpose, and the agent pledged them to a third person, without fraud on the part of the latter: Held, that as the bonds were made payable "to the bearer," they could not be recovered back in trover by the real owner.

TROVER for five *Prussian* bonds. Plea, not guilty, and issue thereon. At the trial before *Abbott*, C. J. at the *London* Adjourned Sittings after last *Michaelmas* Term, the case was this:—The bonds in question were the property of the plaintiff, a *Prussian* nobleman, resident abroad, and were, in the year 1821, deposited by him in the hands of Messrs. *Agassiz* & Co., his agents in *London*, to receive the interest upon them. In *January*, 1822, *Agassiz* & Co. without any authority from the plaintiff, pledged the bonds with the defendants, stock-brokers in *London*, for an advance in cash, as they had frequently done before with respect to other securities of a similar nature. The bonds were pledged apparently as the property of *Agassiz* & Co., but no distinct representation was made on that subject, the defendants having no knowledge or suspicion that the bonds in fact did not belong to *Agassiz* & Co. In *February*, 1823, *Agassiz* & Co. became bankrupts, upon which the defendants sold the bonds for their then value, and carried the amount to the credit of the bankrupts, after which they were still large creditors of their estate. On the 23d of *May*, 1823, the bonds, or their proceeds, were demanded of the defendants by the attorney for the plaintiff; but they refused to deliver them, and the present action was brought. The King of *Prussia*, by his general bond, bearing date 7th *May*, 1818, acknowledged to have received 5,000,000*l*. sterling by way of loan; and that he had thereby directed his ministry for the department of his treasury, to issue the amount of the said loan in special bonds payable to the bearer; and by the same bond he declared as follows: "We hereby declare ourselves and successors, debtors to all those concerned in the present loan, to the extent of 5,000,000*l*. sterling, for the amount expressed in each spe-

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cial bond; and we acknowledge ourselves bound *to every person who shall for the time being be the holder of one or more of these special bonds*, for the punctual payment of the principal and interest of each, according to the tenor thereof." The general bond contained other engagements and stipulations, not necessary to set out; and then followed the following certificate, written upon each of the bonds in question:—

"This is to certify, *that the bearer hereof* is entitled to the sum of 100*l.* sterling, part of the loan of 5,000,000*l.* secured by the above general bond of his Majesty the King of *Prussia*, and the interest thereon, value having been duly paid to the *Prussian* government for the same. We, the undersigned, declare this to be a special bond, granted by us in conformity to the engagement of his Majesty the King of *Prussia*, our most gracious Master, contained in the general bond, of which the above is a copy. *Berlin*, the 15th of *May*, 1818. The Royal Ministry for the department of the treasury and state credit. Signed, *Friese. Rother.* Entered, *Berlin*, 1818.—fol. 187. *Bornerman*."

It was proved in evidence, that bonds of this description were constantly sold in the money market, and passed from hand to hand like exchequer bills, and were sold at prices varying with the market. On the part of the defendants it was objected, that upon this case there was no question of fact for the jury, but a mere question of law for the Court; namely, whether these bonds, being in their nature such that they in fact passed from hand to hand by delivery, could be followed by the owner into the hands of a bonâ fide holder for a valuable consideration; and it was contended, that they could not, and therefore that the defendants were entitled to a verdict. The learned Judge, however, left it as a question of fact to the jury, whether, at the time when the bonds were pledged to the defendants, they did or did not know that they were not the property of *Agassiz* & Co.; telling them, he was of opinion, in point of law, that such bonds might be pledged to any person who did not know

that the party pledging was not the real owner; and directing them to find their verdict for the plaintiff, or the defendants, according as they had reason to believe that the defendants considered the bonds to be the property of *Agassiz* & Co. or of some other person. The jury found their verdict for the defendants, the plaintiff having leave to move, either to enter a verdict, or for a new trial.

Copley, A. G. in *Hilary* Term last, moved accordingly, and obtained a rule nisi; against which

Scarlett, *Marryat*, *Gurney*, and *F. Pollock* now shewed cause. It is impossible to distinguish these instruments from exchequer bills, the blanks of which are not filled up. They are payable to bearer, and there is nothing on the face of them to shew that they are not the property of the bearer. This case, therefore, is decided by *Wookey* v. *Pole* (*a*), where it was held, that the property in an exchequer bill, the blank in which was not filled up, passed by delivery, like bank notes and bills of exchange indorsed in blank. It has, indeed, been held, that *East India* bonds are not negotiable instruments like bills of exchange, *Glyn* v. *Baker* (*b*); but they are, in the first instance, made payable to a particular individual by name, and therefore require his indorsement before they can be passed by delivery: and second, in that case, the defendant had what the Court considered equivalent to knowledge that the instruments did not belong to the person from whom he received them. Here the bonds are made payable to bearer, they are the representatives of money, and therefore pass, like bills or notes indorsed in blank, by delivery. The law then is express in favour of the defendants, and the facts are equally so, because the jury have negatived the question of fraud, by finding that the defendants, when they received the bonds, had no knowledge or suspicion that they were

(*a*) 4 B. & A. 1.

(*b*) 13 East, 509.

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the property of any other person than *Agassiz* & Co. from whom they received them. They also cited *Miller* v. *Race* (*a*), *Peacock* v. *Rhodes* (*b*), *Grant* v. *Vaughan* (*c*), and *Collins* v. *Martin* (*d*).

Copley, A. G. and *D. F. Jones*, contrà. There are some exceptions to the general rule of law, that an agent cannot pledge the property of his principal; and the question is, whether this particular species of property comes within them. Those exceptions were for a long time confined to bills of exchange and bank notes, till, by the case of *Wookey* v. *Pole*, they were further extended to exchequer bills. The instruments in question differ in their form and nature equally from all those so excepted. This is the case of an agent pledging a bond belonging to his principal, which by law he cannot do. The exception from the general law applies only to money, or the representatives of money; these bonds are neither the one nor the other. *India* bonds, it has been settled, and is now admitted, cannot be pledged, and they are, in their form and nature, exceedingly similar to the bonds in question. The right of property in these bonds cannot pass by delivery, unless it carries with it a right of action also; but what right of action has the holder of them? None. They are not payable to any particular person, nor at any specified time or place; no one could possibly sue upon them. [*Abbott*, C. J. Nor can any one sue upon an exchequer bill.] But the holder may pay it to government, as money, in liquidation of any debt he may owe the Crown. These bonds do not come within the reason of the exception any more than the terms. What is the reason of the exception? Not that money in specie cannot be marked, because, even if it were marked, it could not be recovered from a bonâ fide holder; but that bills and notes are securities for money in general use throughout the country, and form the ordinary

(*a*) 1 Burr. 452.
(*b*) Doug. 633.
(*c*) 3 Burr 1516.
(*d*) 1 B. & P. 648.

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circulation of it; in a word, the convenience of trade is the reason of the exception. That was the ground of the decision in *Wookey* v. *Pole*, but it has no application to the present case. *Prussian* bonds are not in use here as securities for money, they are not recognized by the government, and have no circulation as such; they are the mere objects of purchase and sale, having no fixed value, but fluctuate in price like any other commodity bought in the market. [*Abbott*, C. J. Exchequer bills also are the objects of purchase and sale, and fluctuate in price.] Undoubtedly; but they are the representatives of money, and are dealt with accordingly. This case is within the principles laid down by Lord *Holt* in *Ford* v. *Hopkins* (*a*), where it was held, that trover might be maintained for a lottery ticket, and where his Lordship said, "If bank notes, exchequer notes, or million tickets, or the like, are stolen or lost, the owner has such an interest or property in them, as to bring an action into whatsoever hands they are come; money or cash is not to be distinguished, but these notes or bills are distinguishable, and cannot be reckoned as cash." Upon the broad principle, therefore, that an agent cannot pledge the property of his principal, and that these instruments do not come within any of the exceptions from that general rule of law, the plaintiff is entitled to recover.

ABBOTT, C. J.—I am of opinion that this rule ought to be discharged. Looking at the form of these instruments, it seems to me impossible to distinguish them from those which have been excepted out of the general rule of law, and held to be transferrible by delivery. They are, in substance, acknowledgments, or certificates, that certain sums of money are due to the bearer, with interest thereon, and therefore they are perfectly analogous to bills of exchange indorsed in blank, or to bank notes. I think this is the sound construction of the instruments themselves, and I am

(*a*) 1 Salk. 283.

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quite satisfied that it will be most for the advantage of the commercial world to put them at once upon this footing.

Holroyd, J. (a).—I am of the same opinion. I think that, according to decided cases, the bearer of these bonds, having become so bonâ fide for a valuable consideration, is the owner of them, and is entitled to dispose of them just the same as of the money which they represent.

Littledale, J.—The case respecting the *India* bonds stands alone. The defendant there was guilty of mala fides, and the decision of the court was grounded, chiefly, if not entirely, upon that fact. I cannot consider that case as a decision that *India* bonds are not negotiable instruments; for though *Le Blanc*, J., certainly intimated a strong opinion to that effect, it may I think be collected from the report that Lord *Ellenborough* inclined to be of a different opinion. For the reasons already assigned by the court, I am clearly of opinion, in point of law, that these are negotiable instruments, like bills of exchange, and it seems to me that in so deciding, we are attending equally to the policy and the law of the country.

Rule discharged.

(a) *Bayley*, J., was absent.

Ex parte Davey, Gent., one, &c.

Tuesday, June 22.

Where an attorney intending to apply to be re-admitted on the roll, affixed his notice outside the Court in the morning before the sitting of the court, on the first day of the Term of which notice was intended to be given:—Held that it was a sufficient compliance with the rule, T. 33 G. 3.

F. Kelly applied to the court to re-admit an attorney upon the roll, on the usual affidavit. All the formalities

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required by the rule of court, T. 33 G. 3. (*a*), had been complied with, except that the notice thereby required to be affixed outside the court had not been affixed until the morning of the first day of the last preceding term; and doubt had been entertained whether that was a notice given "for the space of one full term, previous to the term in which he shall apply to be admitted," within the meaning of that rule. Here the notice had been given previous to the sitting of the full court on the first day of the term, and as the term could not be considered as having commenced until the court had actually sat, he submitted that the spirit of the rule had been complied with, and the party was entitled to his admission. He cited ex parte *Dent* (*b*), *Pugh* v. *Robinson* (*c*), and *Anonymous* (*d*).

LITTLEDALE, J. (the only Judge in court) expressed as his opinion upon this point, that the rule was peremptory, that a full term's notice should be given, and that affixing the notice even before a single Judge had sat on the first day of the term, would not satisfy the meaning of the rule. Upon mentioning the case, however, to the other Judges, when the court was full, he said, they were now all of opinion, that a notice affixed before the sitting of the full court on the first day of the term was sufficient, and therefore granted the application.

(*a*) Which states that "every person who shall intend to apply for admission as an attorney in the King's Bench, and who shall not have been admitted an attorney or solicitor of any other court, shall, for the space of one *full* Term, previous to the Term in which he shall apply to be admitted, cause his name and place of abode, and also the name or names, and place or places of abode of the attorney or attornies, to whom he shall have been articled, written in legible characters, to be affixed on the outside of the Court of King's Bench, in such place as public notices are usually affixed on, and in the King's Bench office; and also enter, or cause to be entered, in a book to be kept for that purpose, at each of the Judge's chambers of this court, his name and place of abode, and also the name and place of abode of the attorney or attornies, to whom he shall have been articled."

(*b*) 1 B. & A. 189. (*c*) 1 T. R. 116. (*d*) 1 Chitty's R. 557.

Wednesday, June 23.

S. DYER and others *v.* W. PEARSON, D. PRICE, and W. CLAY.

An agent cannot sell the goods of his principal without authority for that purpose; but an authority to sell may be implied from circumstances. Where a London agent was employed by his principal in the country, to import goods from abroad, and send them to their destination; and by the bill of lading the goods were deliverable *to order or assigns*, and indorsed in *blank* by the shipper, and the agent, after being allowed to retain possession of the bill of lading, for five months, sold the goods without any authority for that purpose:—Held, that it was a question for the jury, whether the principal had not by his conduct enabled his agent to hold himself out to the world as a person having authority to sell, and thereby convey a title to the vendee.

THIS was an action of trover for ten bales of wool. Plea not guilty, and issue thereon. At the trial before *Abbott*, C. J., at the *London* sittings after *Michaelmas* Term, the case was this: The plaintiffs, Messrs. *Dyer* and Sons, were clothiers, carrying on business at *Wootton under Edge*, in *Gloucestershire*. The defendants resided in *London*, *Pearson* and *Price* being warehousemen, and *Clay* a woollen-draper. In the month of *November*, 1823, the plaintiffs commissioned Mr. *Smith* their *London* agent to import for them thirty bales of *Saxony* wool from *Germany*. The wool was ordered by *Smith* of Messrs. *Van Smissen*, and *Co.*, merchants in that country. In order to provide for the payment of the wools, it appeared from the correspondence between Messrs. *Van Smissen* and *Smith*, that the former required the acceptance of a *London* banker before the bills of lading were transmitted. In consequence of this, Messrs. *Esdaile* and Co., bankers in *London*, upon receiving an indemnity from the plaintiffs, accepted bills to the amount required, which were immediately forwarded to *Van Smissen* and Co. In *December*, 1823, the wools arrived, accompanied by a letter to *Smith*, containing the bill of lading and invoice. The invoice he transmitted to the plaintiffs, but the bill of lading he delivered to the defendants *Pearson* and *Price*, for the purpose of doing the needful as warehousemen. The bill of lading made the wools deliverable *to order or assigns*, and was indorsed in *blank* by *Van Smissen*, and Co. The wools were entered in *Pearson* and *Price's* books in *Smith's* name, and as his property. *Smith* not being at that time in a condition to pay the import duties, and other expenses incident to the wool, prevailed

upon *Pearson* and *Price* to advance the money required for those purposes, on the security of the ten bales in question. The other twenty were then forwarded to the plaintiffs, the bill of lading still remaining in the hands of *Pearson* and *Price*. In the month of *May* following, *Smith*, in order to pay *Pearson* and *Price* their charges, and reimburse them for the money they had advanced, sold the ten bales to the defendant, *Clay*, for 579*l.*; and by *Smith*'s directions, he paid *Pearson* and *Price* 528*l.*, the amount of their lien, and the remainder was received by *Smith* himself. *Smith* was a mere agent, and had no authority whatever to sell any part of the wool. The plaintiffs, upon being informed of this transaction, demanded the ten bags of wool of *Pearson* and *Price*, tendering them the amount of their warehouse charges, and after a demand of, and refusal by all the defendants respectively, to deliver the wool, the present action was brought. It was contended on the part of the defendants, that although an agent could not, on general principles, pledge or sell the goods of his principal without his authority; yet that such an authority might be implied from the conduct of the principal himself. Here the plaintiffs, by allowing *Smith*, their agent, to import the wools in his own name, and to appear to the world as the true owner, there was sufficient ground for implying an authority to sell, and convey a good title to the vendee. The Lord Chief Justice told the jury that the question for their consideration was, whether *Clay* had purchased the wools, under circumstances which ought to have induced a reasonable, prudent, and cautious man to believe, that *Smith* was a person who had no authority to sell; and his lordship ruled, that if a man takes upon himself to purchase from another, under circumstances which ought to excite his suspicion, and induce him to discredit the authority of the person selling, a sale under such circumstances could not be considered bonâ fide, and therefore the vendee could not hold the goods, if it afterwards turned out that the person of whom he bought had no such authority. If the jury

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should be of opinion that the sale was conducted under such circumstances as ought to have excited discredit and distrust in *Clay*'s mind of *Smith*'s authority to sell, the sale was not valid, and the plaintiffs would be entitled to recover, but if otherwise, they ought to find for the defendants. The Jury found for the defendants.

Copley, A. G., in *Hilary* Term last, moved for a new trial on the ground of misdirection. It is perfectly clear that this was a sale to *Clay* under such circumstances as entitle the plaintiffs to recover the possession of the property. *Smith* was merely an agent for the purpose of importing the goods and transmitting them to the plaintiffs. He clearly had no authority to dispose of them in any way whatever, and if so, then, in point of law, his acts cannot bind the plaintiffs, unless they did something, or omitted to do something, which had the effect of imposing on the person who made the purchase. The question, therefore, for the consideration of the Jury was, whether the plaintiffs had so conducted themselves with respect to the goods, as to induce *Clay* to believe that *Smith* had authority to sell. There is no principle more clearly established in the law merchant, than, that an agent cannot bind his principal beyond the scope of his authority; and it is upon this ground that a factor, whose duty is to sell, cannot pledge the property of his principal. Here, *Smith* had certainly no express authority to sell; but admitting that an authority to sell may be implied, what evidence was there to raise the implication of an authority? The only fact tending that way, is, that the plaintiffs had left the bills of lading indorsed in blank in the hands of *Smith*; but it is clear that a bill of lading gives no title to any particular individual. The invoice and letter of advice, are the instruments by which a person acquires a title to the goods, and they were kept by the plaintiffs. This is simply the case of an agent residing in *London*, employed by his principal to forward goods imported on his account. It was necessary that *Smith* should have possession of the bill of lading for

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the purpose of enabling him to get possession of the goods, and without which he could not have discharged his duty as an agent. On the face of the bill of lading *Smith* had no title to the goods, there being no name mentioned in it. The question therefore for the Jury was, not whether there was any thing in the transaction to lead *Clay* to suppose that *Smith* had authority to dispose of the goods, but whether the plaintiffs did any thing to fix them with an act which *Smith* was not authorised to do as their agent. If the plaintiffs were guilty of any negligence with respect to the transaction, then it must be admitted that they would be bound by the consequences resulting from their conduct; but although *Clay* might suppose that all this was in the ordinary course of business, and that *Smith* was the owner of the goods, still, unless there was some negligence or misconduct on the part of the plaintiffs, they are not bound by the acts of *Smith*. In the absence of all evidence of negligence or misconduct, then the case stands nakedly as that of an agent selling the goods of his principal without any authority express or implied. The Court having granted a rule nisi,

Scarlett and *F. Pollock* now shewed cause. This case was properly left to the jury. But assuming the proposition put on the other side to be correct, still there was quite enough to shew that *Smith* had an implied authority to sell the goods in question. It is not necessary that an agent should have an express authority from his principal to sell, although it is a general rule of law that an agent cannot bind his principal, unless he acts within the scope of his authority. In *Pickering* v. *Busk* (a) it was held that such an authority may be implied from the conduct of the parties. The question then is, whether in this case the conduct of the plaintiffs did not import at least an implied authority to *Smith* to sell. Here the wools are imported in *Smith's* own name with the consent of the plaintiffs. To all the world, therefore, he appears as the owner, and there is nothing to indi-

(a) 15 East, 38.

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cate a contrary inference. As soon as the goods arrive they are allowed to remain for a period of five months, in his name, and as his property, in the books of *Pearson* and *Price;* and during all that time *Smith* has either the possession of or control over the bill of lading, which is the only authority entitling the party to the possession of the goods. It may be true that the bill of lading did not contain *Smith's* name on the face of it; but that affords a still stronger argument against the plaintiffs' right to recover, because the goods were to be delivered to the order of the shipper or his assigns, and as the indorsement was in blank it was equivalent to an order to deliver to the bearer, whoever he might be. The plaintiffs, therefore, having, by their negligence, permitted *Smith* to appear to the world as the true owner of the wool, the law will raise an implication of authority to sell, and thereby to bind the plaintiffs by his acts.

Copley, A. G. (with whom was *Wilde,* Serjt.) having insisted that *Smith* was, of necessity, entrusted with the possession of the bill of lading, for the purpose of importing and receiving the goods in his character of agent, and consequently that nothing like an authority could be implied from that circumstance, was stopped by the Court.

ABBOTT, C. J.—I am of opinion that there ought to be a new trial. The points which I left to the consideration of the Jury do not appear to me to have embraced the whole case. By the general rule of law merchant, a man who has no authority to sell, cannot, by making a sale, transfer the property to another. The first, and leading exception to that rule is, the case of sales in market overt, by the common law; but it is clear that this case does not come within that exception, because this was not a sale in market overt. Then if that be the rule of law, I ought either to have told the Jury, that even if there was in their judgment an unsuspicious purchase by the defendants, yet as *Smith,* the agent, had undoubtedly no authority to sell, their verdict should be

for the plaintiffs, or, (which was the most favorable way of putting the case for the defendants) I should have left the Jury to say whether the plaintiffs had, by their own conduct, enabled *Smith* to hold himself forth to the world, not merely as having the possession of, but the property in the goods. That question I certainly did not leave to the Jury. The most favorable way of leaving the case for the defendants to the Jury, would be to say, as is certainly my opinion, that if the real owner of property suffers another to have the possession of it, and to have those documents which are the muniments of title, a sale by such a person shall bind the true owner. That is a question of fact; and if that question does arise in this case, it should have been submitted to the Jury. It is unnecessary at present to say what would have been the result of the evidence upon that fact, or that I should have told the Jury that that fact was in favor of the defendant. It is enough for the present to say, that the rule for a new trial must be made absolute.

BAYLEY, J., HOLROYD, J., and LITTLEDALE, J., concurred.

Rule absolute.

AUSTIN v. DEBNAM.

Friday, June 25.

Where A. arrested B. for 23*l.* knowing that upon the balance of their mutual dealings there was but 5*l.* due to him: Held, that the arrest was malicious and without any probable cause.

DECLARATION in case, for a malicious arrest, alleged, that defendant, on &c. at &c. not then having any reasonable or probable cause of action against plaintiff, to the amount of the sum of money for which he maliciously caused him to be arrested as thereinafter mentioned, maliciously caused and procured a bill of *Middlesex* to be issued out of the Court of King's Bench, commanding the sheriff of *Middlesex* to arrest plaintiff, and falsely, and without having any reasonable or probable cause of action against plaintiff to the amount of 15*l.* or upwards, caused and procured the said bill of *Middlesex* to be, and the same was indorsed for

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bail for 23*l.*; that defendant afterwards, to wit, on &c. at &c. without any reasonable or probable cause of action against plaintiff to the amount of 15*l.* or upwards, maliciously caused and procured plaintiff to be arrested and kept imprisoned until he gave a bail bond, and plaintiff afterwards, to wit, on &c. at &c. paid to defendant the sum of 5*l.* 5*s.* and the sum of 3*l.* 13*s.* 6*d.* in full discharge of the suit; which sum of 5*l.* 5*s.* defendant accepted of and from plaintiff as the amount of the debt in the suit, and the sum of 3*l.* 13*s.* 6*d.* as the amount of the costs; that such proceedings were thereupon had in the suit, that it was ordered by one of the Judges of the said Court, that all proceedings in the suit should be staid, which order was afterwards made a rule of the said Court, and the said action was and is by means of the premises and according to the rules and practice of the said Court wholly discharged, ended, and determined. By means of which said premises, &c., concluding in the usual form. Plea, the general issue, not guilty, and issue thereon. At the trial before *Abbott*, C. J. at the *London* adjourned Sittings after *Trinity* Term, 1823, proof was given of the affidavit to hold to bail, of the bill of *Middlesex* indorsed for bail for 23*l.*, of the arrest, and of the execution of the bail bond, the expense of which, being 1*l.* 9*s.*, the plaintiff had paid. The following facts were then detailed in evidence. The plaintiff was a baker, and the defendant a carpenter. The defendant had done work for the plaintiff, and the plaintiff had supplied the defendant with bread. Mutual claims thus arose between them, respecting the amount of which they differed, and the plaintiff desired the defendant to send him his bill, in consequence of which the defendant, next day, told the plaintiff "that he had reckoned up his book, and that there was 5*l.* coming to him." The defendant's attorney then wrote a letter to the plaintiff, demanding the payment of the "balance" due to the defendant. The defendant's claim for work done, not deducting the plaintiff's claim for bread supplied, amounted to 20*l.*, which sum the plaintiff tendered, but the defendant

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refused it, saying, first, that it was more than was due, and afterwards, that he had put the job into the hands of his attorney and therefore could not settle it himself. Subsequently to the arrest, the defendant was asked why he had arrested the plaintiff for 23*l*., and whether he had in fact cast up his book; to which he replied, that there had been obstinacy on both sides, and that upon the casting up of his book, "there was 5*l*. coming to him." The plaintiff ultimately paid 5*l*. 5*s*. for the debt, and 3*l*. 13*s*. 6*d*. for the costs, and the defendant gave a receipt for those sums, in which he described the former as the *balance* due to him. The rule of Court for staying the proceedings was then put in, and closed the plaintiff's case. Three objections were taken for the defendant. First, that the rule of Court, staying proceedings, was not a legal termination of the former suit. Second, that though the plaintiff had a right of set-off, the defendant was not bound by that right, and as there was a debt of 20*l*. due to the defendant, he had reasonable and probable cause for the arrest; and on this point, *Brown* v. *Pigeon* (*a*) was cited and relied on for the defendant, and *Turlington*'s case (*b*), and *Dromfield* v. *Archer* (*c*), for the plaintiff. Third, that in this form of declaration the plaintiff could not give evidence of the set-off, because the special facts were not set out, and as the evidence now stood, there was a fatal variance between that and the declaration. The Chief Justice overruled all these objections, leaving it to the Jury, upon consideration of all the facts, to say, whether the arrest was or was not malicious. The Jury found a verdict for the plaintiff, damages 5*l*., and the defendant had liberty to move to enter a nonsuit.

Gurney, in *Michaelmas* Term, having moved accordingly, and obtained a rule nisi on all the points, either for a nonsuit or a new trial,

Scarlett and *Archbold* now shewed cause. The facts of

(*a*) 2 Campb. 594. (*b*) 4 Burr. 1996. (*c*) Ante, vol. i. 67.

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this case are sufficient to support the verdict, and the Jury have drawn the proper conclusion from them. Looking at the whole transaction, it is plain that there was a full understanding between the parties, that the balance of accounts was to be the only existing debt. The defendant, by repeated acts, shewed, that he knew 5*l.* to be the amount of that debt; for first he says, "I have cast up my book, and there is 5*l.* coming to me;" then he authorises his attorney to demand payment of "the balance" due to him; and lastly, when 20*l.* is tendered to him, he declines accepting it, saying, that there is not so much due. In point of law, also, this action is maintainable. Where there are mutual accounts between two parties, the one cannot legally arrest the other for more than the actual balance, for under such circumstances the statute of set-off provides that the real debt shall be taken as the ground of arrest This was decided in *Turlington*'s case, and Lord *Mansfield* mentions that decision in terms of approbation in the case of *Barclay* v. *Hunt* (*a*). Again, *Dromfield* v. *Archer* is expressly in point with the present case, and the reasoning of the Court there is peculiarly applicable here. The rule there laid down, and which must govern in all cases of this kind, is, that the reasonable and probable cause for arrest is to obtain security for the payment of the sum really due, and the sum really due is the balance, and no more.

Gurney and *Chitty*, contrà. There was a sum of 20*l.* actually due to the defendant, and therefore *Brown* v. *Pigeon* is a direct authority to shew that he had reasonable and probable cause for the arrest. It was not proved at the trial that the defendant had agreed to consider the balance of accounts as the existing debt, and certainly he was not by law bound to do so; because the statute merely authorises a set-off, it does not expressly direct that it shall be made; in which respect it materially differs from the 5 *G.* 2. c. 10. as to mutual credits. But even if in strictness of law the ba-

(*a*) 4 Burr. 1992.

lance only is the debt, still it is not a necessary consequence that an arrest for a larger sum is malicious; the malice cannot be presumed, it must be shewn, and there was no evidence of it here. But upon this declaration it was not competent to the plaintiff to give evidence of his cross demand, because it does not set out the special circumstances out of which that demand arose, and does not inform the defendant clearly on what grounds the action is brought. It merely avers, in general terms, that the defendant had no reasonable or probable cause of action, whereas it should have shewn how that was, by stating that there were mutual debts and credits, and that the balance due upon them was less than 15*l*.

ABBOTT, C. J.—I think this rule ought to be discharged. It is by no means clear to me that the general question of law arises in this case, because the evidence undoubtedly tends to shew that there was an understanding between the parties that the balance of accounts only was to be treated as the existing debt. It was in proof that the defendant had declared, previous to the arrest, that only 5*l*. was due to him; and I am at a loss to conceive how he can afterwards contend that he has reasonable and probable cause for arresting the plaintiff for 23*l*. I am however of opinion, upon the general question of law, that by the true construction of the statute of set-off, where there are mutual claims, the balance only, is, as the foundation for an arrest, the real existing debt. Lord *Ellenborough* certainly did, in one instance, express a contrary opinion; but with all the respect which I entertain for his decisions, I cannot refrain from observing, that *Brown* v. *Pigeon* was a nisi prius decision only, and that by the mode in which that action terminated, a juror having been withdrawn, the parties were precluded from the possibility of having his opinion reconsidered. The question has subsequently been before the Court in the recent case of *Dromfield* v. *Archer*, on which occasion the former case was cited, but not acted upon, for there the arrest being made on one

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side of the account only, was held to be without probable cause, and malicious; and, upon reconsideration, I confess that decision appears to me to be consistent both with justice and with common sense. Then, it has been objected that the declaration is insufficient, because it does not allege that the defendant had no cause of action against the plaintiff, but only, that he had no reasonable or probable cause of action to the amount for which he arrested the plaintiff. The language of the declaration is certainly loose and indistinct, but the averment is, I think, sufficient for the admission of evidence of the real merits and justice of the case, and they clearly shew that the plaintiff was entitled to maintain the action. For these reasons I am of opinion that we ought to discharge this rule.

HOLROYD, J. (a) and LITTLEDALE, J. concurred.

Rule discharged.

(a) BAYLEY, J. was sitting in the Bail Court.

Friday, June 25.

SIDAWAY v. HAY.

Discharge under a *Scotch* sequestration is an effectual bar to an action for a debt contracted in *England* by a *Scotch* trader before the sequestration.

DECLARATION in debt for goods sold and delivered, with common counts. Pleas—first, the general issue; second, the statute of limitations; and third, that plaintiff ought not to have or maintain his action, because defendant says, that before and on 1st *January*, 1814, and from thence continually until the sequestration of the estate, heritable, and moveable, real and personal of defendant, after mentioned, he was a merchant and trader in gross and by retail, to wit, an ironmonger, residing and carrying on his said trade at *Edinburgh*, in that part of the United Kingdom called *Scotland*, and during all that time sought his living by buying and selling, and that defendant, on the day and year aforesaid, became indebted to persons trading under the

firm of C. and Co. in the sum of 186*l.* 15*s.* 2*d.* for a just and true debt, and was also indebted to divers other persons in divers large sums of money, and being so indebted and being insolvent, and unable to pay the said debt due to Messrs. C. & Co. and the said other debts, afterwards, on &c. at *Edinburgh* aforesaid, became and was under legal diligence by horning and caption, against him for the debt due to C. & Co.; and having fled for his personal safety from such diligence, did afterwards, and within four months of the last step of the said diligence, with concurrence of the said C. & Co. to whom he was so indebted as aforesaid, apply, by summary petition to the Lords in Council and Session of the first division of the Court of Session in *Scotland*, for the sequestration of the whole real and personal estate of him, defendant; that a sequestration was granted and meetings fixed and advertised as required by 54 *Geo.* 3. c. 137. s. 16., and that the petition was registered as required by the 22d section of the same statute; that meetings were holden accordingly, and that at the first an interim factor, and at the second a trustee, were respectively chosen; and that meetings for the examination of the defendant were appointed and advertised pursuant to the 32d section of the same statute. The plea then set out the amount of the debts actually proved, and the amount of the debts of those creditors who consented to the defendant's discharge, shewing that the consent was conformable to the provisions of the 61st and 64th sections. It then set out a petition in the form required by the 61st section, and stated that the Lords in Council and Session aforesaid did, on the 11th *March*, 1818, find defendant entitled to be finally discharged of all his debts contracted before the said application to sequestrate his estate, and did grant commission to the sheriff depute for the county of *Edinburgh* to take defendant's oath. It then averred that defendant did make oath that he had complied with all the requisites of 54 *Geo.* 3. c. 137., and that afterwards, to wit, on the 2d *June*, 1820, the Court of Session, by their decree, did find the defendant

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had complied with all the requisites of the statute, and therefore found him freed and discharged of all debts contracted by him before the 21st *May*, 1816. It then averred, that the several supposed debts and causes of action mentioned in the declaration, accrued to plaintiff before the 21st *May*, 1816, and were proveable under the said sequestration. Plaintiff took issue on the first two pleas, and to the third replied, that the said causes of action accrued to him in *England*. Demurrer to the replication, and joinder in demurrer.

Scarlett, in support of the demurrer. The question raised upon these pleadings is one of some novelty, and of great importance, namely, whether a man who has been made a bankrupt, and obtained his certificate according to the laws of *Scotland*, is thereby discharged from debts incurred in *England* previously to his bankruptcy. On the part of the defendant it is contended, that he is, and consequently that the plea put upon the record in this case is a good answer to the action. The question will turn upon the construction which the Court shall think ought to be given to the statute 54 *Geo.* 3. c. 137. That statute enacts, that after the diets are fixed for the examination of the bankrupt and others, "the trustee shall immediately publish an advertisement in the *Edinburgh* Gazette, and in the *London* Gazette, intimating to the creditors his appointment as trustee on the bankrupt estate, the two days fixed for the examination of the bankrupt," &c. (section 32.); and that "after the period assigned for the second dividend, it shall be lawful for the bankrupt, with concurrence of the trustee, and four-fifths of the creditors in number and value, to apply to the Court of Session by petition, praying that he may be held as finally discharged of all his debts contracted before the application for sequestration; and this petition, being intimated upon the wall, and in the *Edinburgh* Gazette and *London* Gazette, the Court shall, at the distance of not less than three calendar months thereafter,

resume the consideration thereof," &c. (section 61). Here are provisions that the *English* creditors may be made acquainted with all the proceedings under the sequestration, from the first stage to the last; and it is difficult to imagine what view the legislature could have in making such provisions, except that the *English* creditors should have an equal opportunity with the *Scotch* creditors of proving their debts; and in default of such proof, should be concluded by the bankrupt's discharge, in common with the *Scotch* creditors. There is no express decision to this effect to be found, but it has been decided, "that a certificate obtained under an *English* commission operates as a discharge of the debts of *Scotch* creditors, proveable under the commission;" *Bank of Scotland* v. *Cuthbert* (*a*); and by parity of reasoning, the converse of the rule should hold good in the present case. Upon all general principles, both of law and justice, a man who is discharged from his debts by a competent authority in his own country, ought to be discharged as against all the world. [*Bayley*, J. It has been held, that a certificate obtained in *Ireland* is not a discharge of a debt previously incurred in *England* (*b*). Would a certificate under the 5 *Geo.* 2. c. 30. obtained here, be a discharge of a debt previously incurred in *Scotland*?] If the debt would be proveable under the commission (*c*), the presumption seems to be that it would. [*Best*, J. Such a certificate would not affect a debt incurred in one of the *British* colonies; that has been repeatedly decided (*d*). *Bayley*, J. Since the union of *England* and *Scotland*, the presumption certainly seems to be that each country would be bound by the bankrupt laws of the other, unless a special exception is to be found in any statute which prevents a *Scotch* sequestration from discharging debts previously incurred in *England*; and I am not aware of any such statute.] None such is to be found. No case can be cited directly in

(*a*) 1 Rose, 462. (*b*) *Quin* v. *Keefe*, 2 H. Bl. 553. (*c*) Section 23.

(*d*) Vide *Cleve* v. *Mills*, Cooke's B. L. 372. Montagu's B. L. 495. et seq. and the cases there collected.

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point; but reasoning upon the language of the 54 *Geo.* 3. c. 137., and upon general principles of law and justice, it is submitted for the defendant, that this debt was discharged by his certificate; and therefore that his plea is good, and entitles him to the judgment of the Court on demurrer.

Campbell, contrà. This plea is bad. A certificate obtained under a *Scotch* sequestration is no bar to a debt previously incurred in *England*. Numerous cases have established, that a contract made by the bankrupt in a foreign country, before his bankruptcy, cannot be affected by a certificate obtained by him in his own country; the contract must originate in, or be connected with, the country in which the certificate is obtained, in order to make the plea of bankruptcy an answer to an action for the debt arising out of that contract. *Balantine* v. *Golding* (a), *Pedder* v. *Macmaster* (b), *Potter* v. *Brown* (c), *Burrows* v. *Jemino* (d), *Quin* v. *Keefe* (e), and *Smith* v. *Buchanan* (f). With reference to such a question as this, the *Scotch* Court of Judicature is a *foreign* Court, and must be so considered here. In construing such a statute as the 54 *Geo.* 3. c. 137. the Court will bear in mind, that it has local and special objects only in view; and will so adapt their construction of general words used in it, as to effect those local and special objects, and those only. The very title of the act shews that its operation was intended to be confined exclusively to *Scotland*, for it is entitled, "An act for rendering the payment of creditors more equal and expeditious in *Scotland*;" in other words, for rendering more equal and expeditious the payment of *Scotch* creditors; for it can have no other meaning. Primâ facie, therefore, the whole purview of the act must be taken to apply to *Scotch* creditors only, unless it can be shewn clearly, that it has a more extended application, which has not been done by the other side, either

(a) Cooke's B. L. 115.
(b) 8 T. R. 609.
(c) 5 East, 174.
(d) 2 Str. 733.
(e) 2 H. Bl. 553.
(f) 1 East, 6.

upon principle or authority. It is quite clear, as has been already intimated by the Court, that a certificate obtained here under the 5 *Geo.* 2. c. 30. would be no bar to a debt previously incurred in *Scotland;* and yet the title of that act is much more general than that of the 54 *Geo.* 3. c. 137. it being entitled, "An act to prevent the committing of frauds by bankrupts." It was indeed held by the present Lord Chancellor in *Selkrig* v. *Davis*(*a*), that "a commission of bankrupt vests in the assignees under it all the *personal* or *moveable* property of the bankrupt; precluding creditors in *Scotland* from attaching, by legal process, the *personal* or *moveable* property of the bankrupt in that country, or from administering it in a course of distribution under a sequestration." But even if that case furnishes an authority for the converse proposition, that a sequestration passes the personal property of the bankrupt in *England*, and thereby precludes the *English* creditor from all remedy but that of proving under it; still, what is to become of the *real* property of the bankrupt? It was held in that case, that "the commission does not affect the *heritable* or *real* property of the bankrupt out of *England;*" and therefore, reasoning è converso, a sequestration would not affect the *real* property of the bankrupt in *England;* and from such a state of things the greatest difficulty and inconvenience must arise. Both these points were also decided the same way by the Court of Session of *Edinburgh*, in the case of the *Bank of Scotland* v. *Cuthbert* (*b*); though the Court were not unanimous there in the opinion, that the sequestration could not be awarded. It is true, that in the latter case the Court were unanimously of opinion, that "a certificate obtained under an *English* commission operates as a discharge of the debts of *Scotch* creditors proveable under the commission:" but the Lord Chancellor did not go that length, at least not in express terms, in the former case of *Selkrig* v. *Davis;* and it by no means follows, even if he had, that the converse of the proposition must hold good. Indeed,

(*a*) 2 Rose, 291. (*b*) 1 Rose, Append. 462.

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there is one direct authority for saying that it would not, *Lewis* v. *Owen* (a), where this Court declared, "that a certificate under a commission of bankruptcy in *Ireland*, since the union with that country, could have no greater operation than a certificate under a *Scottish* sequestration, *which was never thought to discharge a debt contracted in England.*" Upon this authority, and upon the true construction of the act, as applying to *Scotland* only, it is submitted, that the certificate pleaded in this case is no bar to the plaintiff's debt, and therefore that he is entitled to the judgment of the Court. He also referred to *Jeffrey* v. *M'Taggart* (b), and *Godwin* v. *Forbes* (c).

Scarlett, in reply. The evident object of the statute is, that *all* the property of the bankrupt, wherever situate, and of whatever kind, should pass under the sequestration; and if so, it is a necessary consequence that the bankrupt should be discharged from *all* his creditors. Sect. 31. provides, that all the heritable and real property of the bankrupt shall be vested in the trustee; "declaring that the rules of preference, or ranking between the creditors of the ancestor and those of the heir by the law of *Scotland*, are not meant to be altered by any thing contained in this act;" and thereore clearly applying to *all* the creditors, of whatsoever kind or country. Then sect. 61. enacts, "That in case no proposal of composition is made in the manner before specified, or in case the same, when made, shall become ineffectual, no other proposal of a similar kind shall be attended to by the trustee, or be of any effect, unless proof is made that the same has been assented to *by every creditor without exception.*" It is impossible to contend that words so comprehensive as these, can contain any exception in respect to *English* creditors, they must mean every creditor in every part of the world; and therefore this clause is strong to shew, that the act intends the sequestration, and the certificate under it, to operate as against all the world. [*Bayley*,

(a) 4 B. & A. 654. (b) In B. R. Feb. 1817. (c) 1 Buck. 57.

J. May not that section mean every creditor that has proved under the sequestration?] There are no words in the clause to give it any such limitation; and as respects the subject of it, namely, a proposal for a composition, the act of proving cannot alter the situation or the rights of the creditors.

Cur. adv. vult.

Judgment was now delivered by

ABBOTT, C. J.—This case was argued in *Easter* Term last year, when the present Lord Chief Justice *Best* was one of the Judges of this Court. It stood over some time, that an amendment might be made in the defendant's special plea, and afterwards for the consideration of the Court. The judgment which I am now about to deliver, is to be considered as the opinion of my brother *Bayley*, my brother *Holroyd*, and myself; and we are of opinion that judgment should be given for the defendant. This was an action of debt for goods sold and delivered, and on the common money counts, the venue being laid in *London*. The defendant pleaded the general issue, and the statute of limitations, on which no question arises. He has also pleaded, that before, and at the time of the accruing of the several causes of action in the declaration mentioned, and also before and on the 1st day of *January*, 1816, and from thence continually, till the sequestration of his estate in the plea after mentioned, he was a merchant and trader, residing and carrying on his trade at *Edinburgh* in *Scotland*. It then proceeded to allege, with all due formality, the sequestration and the decree of the Lords of Council and Sessions, discharging him from all debts contracted before the 21st *May*, 1816, being the date of the application for sequestration; and averred that the plaintiff's several causes of action accrued before that day, and were proveable under the sequestration. To this plea the plaintiff has replied, that the several causes of action accrued in *England*. The de-

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fendant has demurred to the replication, and the plaintiff has joined in demurrer. The plea is framed on the 54 *Geo.* 3. c. 137. of which statute the 61st section gives the discharge. The statute is entitled, "An act for rendering the payment of creditors more equal and expeditious in *Scotland:*" and the question is, whether a trader residing in *Scotland*, and during such residence contracting a debt in *England*, can be discharged from it under a sequestration issued in *Scotland* in conformity to that statute, in like manner as he would from a debt contracted in *Scotland*. The statute is an act of parliament of the United Kingdom, competent to legislate for any part of the kingdom, and to bind the rights of all persons residing in *England*, equally with those of persons residing in *Scotland*. It raises, therefore, no question as to the authority of the power by which the statute was passed; and the question must turn merely on the construction and effect of this act. By the 61st sect., the bankrupt is enabled, by the means therein mentioned, to apply to the Court of Session by petition, praying that he may be held as finally discharged of all his debts contracted before the application for sequestration; and the Court is authorised, under the circumstances therein mentioned, to pronounce an act or order in terms of the prayer of the petition. The expression is, "all debts," and it is used without any reference or regard to the place where the debts may have been contracted. It must be admitted, that notwithstanding this generality of expression, it is possible that debts contracted in *England* may be out of the general view of the statute, and therefore not comprised in the term "all debts." There is not, however, a single expression importing that debts contracted in *England* are to be excluded in any way from the operation of the statute. There are many provisions manifestly shewing the contrary. By the 15th section, the creditor of *any* trader, without reference to his country, residence, or place of business, may petition for a sequestration, the deposition being made before any Judge, Ordinary, or Justice of the Peace; and

the sequestration is to be of the debtor's whole estate and effects, heritable and moveable, real and personal, for the benefit of his whole just and lawful creditors. By the 17th section, the interim manager is to take possession of the bankrupt's whole estate and effects, and of all title-deeds and instructions of his effects; and the bankrupt must, if required, grant powers of attorney or other deeds necessary or proper for recovering his estate and effects in foreign parts. By the 25th section, the bankrupt is required to exhibit a state of his affairs, specifying his whole estate and effects, heritable and moveable, real and personal, wherever situated. By the 29th section, when the nomination of a trustee has been approved, the Court shall order the bankrupt to execute the proper deeds of conveyance, making over to the trustee his whole estate and effects, heritable and moveable, real and personal, wherever situate, with full power of recovery and sale for the behoof of the creditors; and on his refusal so to do, he is punishable by imprisonment: and whether such deeds be executed or not, the whole estate and effects, of whatever kind and wherever situate (in so far as may be consistent with the laws of other countries, where the effects are out of *Scotland*), shall be deemed to be vested in the trustee for behoof of the creditors. By the 33d section, the bankrupt is to make oath of the truth of the account of his estate and effects, heritable and moveable, real and personal. By the 41st section, the trustee is to proceed to recover and convert into money the whole estate under his management or power, whether at home or in foreign parts. By the 43d section, oaths of verity upon debts may be taken before a Judge, Ordinary, or Justice of the Peace; and where any creditor is out of the kingdom of *Great Britain* and *Ireland*, an oath of credulity by his agent, taken in the same manner, shall be sufficient. Upon the view of these several clauses, it is manifest that all the property of the bankrupt of every kind, and wherever situate, is to be taken from him for the payment of his debts, and that creditors wherever resident, may prove their

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debts and receive their share of the estate. But this is not all; notices are required to be given in the *London* Gazette as well as the *Edinburgh* Gazette, on important occasions; as, for the meetings to chuse the interim manager and trustee, by section 16;—of the appointment of the trustee and of the two days appointed for the public examination of the bankrupt as to the state of his affairs, by section 32;—of the meetings of creditors for directing a sale of remaining effects and of the times of the sale, by section 56;—of the bankrupt's petition for his discharge, of which the court is to resume the consideration at the distance of not less than three months, by section 61; and of the meeting after the expiration of three years, for the disposal of out-standing effects, by section 75. Now it appears to us, that the legislature would not have required these notices unless it had been intended that the discharge should operate on *English* as well as *Scotch* creditors. No sufficient reason has occurred to us for giving an opportunity of inquiring into the affairs and conduct of the bankrupt, and objecting to his discharge, to the persons against whom such discharge would be inoperative with reference to any proceeding in an *English* court. If it be said that it was intended only to enable *English* creditors to have the benefit of the sequestration, if they should so think fit, and to object to the discharge for the purpose of retaining a right of suit in *Scotland*, this argument will contain an acknowledgment that *English* creditors may have the benefit of the sequestration; and then, it being clear that the bankrupt is deprived of all his property for the benefit of all his creditors who think proper to partake of their proportion of it, by an act of a legislature having authority over all parts of the United Kingdom; justice manifestly requires, that no one who may partake of the benefit, should be allowed to sue the debtor when all his property has been given up, if by accident he may happen to meet him in *England*. We ought therefore not to narrow the language of the 61st section, but give to the

phrase "all his debts," the meaning which usually belongs to those words. Several cases were quoted in argument, of which I will now take notice. The cases of *Smith* v. *Buchanan* (*a*), and *Potter* v. *Brown* (*b*), arose on the authority of *American* acts, that is, of legislatures not competent to bind the subjects of this kingdom. In *Odwin* v. *Forbes* (*c*), it has been held that a certificate under an *English* commission, is a good plea to a suit instituted in the Dutch colonial court at *Demerara*, for the recovery of the balance of an account for sugars consigned to and received by the defendant and his partner in *London*, and the ground of that decision was, that English laws are binding on the inhabitants of *Demerara*. The case of *Pedder* v. *M'Master* (*d*), arose on a discharge at *Hamburgh*, and came before the court on an application to discharge the bail, and enter an exoneretur on the bail piece, which could not be done if the effect of the discharge were doubtful. The case of *Quin* v. *Keefe* (*e*) came before the court first in the same way, and afterwards on a plea which was badly pleaded, and there was no decision on the merits. It was the case of an Irish certificate, and of a debt contracted in *England*, while the defendant was residing here. The case of *Jeffery* v. *M'Taggart*, which was before this court in *February*, 1817, on a motion for a new trial, arose, indeed, on this act of the 54 *Geo.* 3. c. 137., but was entirely different from the present. It was an action of assumpsit brought by a trustee under a *Scotch* sequestration in his own name. The demand had vested in the trustee, under this statute, so far as by the law of this country it could do, but as the assignee of a chose in action cannot by the common law of this country sue in his own name, but must sue in the name of the assignor; and as this statute gives no express power to the trustee to sue in his own name, and the statute of 1 *Jac.* c. 15. s. 13. does,

(*a*) 1 East, 6.
(*b*) 5 East, 124.
(*c*) 1 Buck, 57.
(*d*) 8 T. R. 69.
(*e*) 2 H. Bl. 553.

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in express terms, give that power to assignees under an English commission, it was decided that the action was not properly brought in the name of the trustee. Upon this view of the cases, it appears that no one of them contains a decision contrary to our present opinion, which is founded not on any general principle, but on the effect of the particular statute on which the defendant rests his plea. For the reasons I have already mentioned, the judgment of the court must be entered for the defendant.

Judgment for the defendant.

Monday, June 28.

MAY, Gent., one &c., v. BROWN.

In an action for a libel the declaration stated, that plaintiff was an attorney and had been employed by the parishioners of the parish of *St. M.* as vestry clerk; that while he was such vestry clerk, certain prosecutions were preferred against one *M.* for certain misdemeanors, and that *in furtherance of such proceedings, and to bring the same to a successful issue,* certain sums of money belonging to the parishioners were appropriated and applied to the discharge of the expenses and law charges incurred on account of the said proceedings; yet defendant, intending to injure plaintiff in his profession of an attorney, and to cause him to be esteemed a fraudulent practiser in his said profession and in his office as vestry clerk, and to be a person unfit to be trusted therein, and to deprive him of the same, and to cause it to be suspected that plaintiff had fraudulently appropriated money belonging to the parish, falsely and maliciously published of and concerning plaintiff, and of and concerning his conduct in his office as vestry clerk, *and of and concerning the matters aforesaid,* the libel. When the libel was produced at the trial, the imputation appeared to be, that the plaintiff had appropriated money belonging to the parishioners in discharge of the expenses of the prosecutions *after* they had terminated: Held, not a material variance, for the character of the libel was not altered, the misconduct imputed to the plaintiff being the same, whether the money was so applied *before* or *after* the termination of the prosecutions, and the averment, that the libel was published *of and concerning the matters aforesaid,* not making it necessary to prove literally that the libel did relate to all the matters previously stated. Held also, that other libels published by the plaintiff of the defendant, not relating precisely to the same subject, could not be received in evidence, either in bar of the action, or, in mitigation of damages.

CASE for a libel. The declaration stated that long before the publication of the libel thereinafter mentioned, plaintiff had been an attorney; and being such attorney had been employed by the parishioners of the parish of *St. Matthew, Bethnal Green,* as vestry clerk; that while plaintiff was such vestry clerk, certain prosecutions were preferred and carried on against one *Joseph Merceron,* for certain misdemeanors before then alleged to have been

committed by him; and that *in furtherance of such proceedings, and to bring the same to a successful issue*, certain sums of money belonging to the parishioners of the said parish, were appropriated and applied to the discharge of the expenses and law charges incurred on account of the said proceedings, to wit, at &c.; yet defendant, well knowing &c., but contriving &c., to injure plaintiff in his said business and profession of an attorney, and to cause him to be esteemed and taken to be a dishonest, corrupt, and fraudulent practiser in his said business and profession, and in his office and situation as vestry clerk as aforesaid, and to be a person unfit to be trusted therein, and to deprive him of the same, and to cause it to be suspected and believed, that plaintiff had fraudulently and clandestinely appropriated and applied certain sums of money of and belonging to the said parishioners, theretofore, to wit, on &c., at &c., falsely, wickedly, and maliciously, did compose, write, and publish in a certain newspaper, called *The Sunday Monitor*, of and concerning plaintiff, and of and concerning his conduct in his office and situation as vestry clerk as aforesaid, and *of and concerning the matters aforesaid*, a certain malicious and defamatory libel, containing, amongst others, the defamatory matters following, of and concerning plaintiff, and of and concerning his conduct as such vestry clerk as aforesaid, and *of and concerning the matters aforesaid*, that is to say: "*St Matthew, Bethnal Green*. At a vestry meeting, held in the parish of *St. Matthew, Bethnal Green*, on *Wednesday*, the 29th of *March* last, the following resolutions were confirmed and ordered to be printed in *The Sunday Monitor*. It is worthy of remark, that the circumstances to which the resolutions here inserted relate, took place after the trial of Mr. *Merceron*, (meaning the aforesaid *Joseph Merceron*,) though only very recently discovered; and the present Lord Chief Justice on that occasion, in his charge to the jury, expressly declared, that although notice had been given in the church, and although the vestry voted the

payment of Mr. *Merceron's* law expenses, yet, if the jury thought he had not given all the publicity to the transaction which it was in his power to give, then the charge of clandestinity was established. Mr. *May*, (meaning plaintiff) the vestry clerk, and Mr. *Wrightson*, were then present as principal witnesses against Mr. *Merceron*, as were also Mr. *Bumford* and Mr. *Talbot*, two of the committee of his prosecutors." And in a certain other part of which libel were contained the false, scandalous, malicious, and defamatory matters following, of and concerning plaintiff, and of and concerning his said duty and office of vestry clerk, and of and concerning other his legal and professional duties, and *of and concerning the matters aforesaid*, that is to say: "Resolved, that a committee having been appointed on the 29th day of *April*, 1818, to proceed with certain prosecutions against Mr. *Merceron*, (meaning the said *Joseph Merceron*,) and to raise by subscription a fund to defray the future law expenses consequent thereupon, the said committee did, on the 20th day of *August* following, make a report in writing to the vestry, which stated *that they had not raised any money by subscription to defray* the future law expenses which they had nevertheless incurred; and that the said law charges consisted of two bills of Messrs *Knight* & *Freeman*, namely, one amounting to 313*l.* 19*s.* 7*d.* and the other to 314*l.* 3*s.* making together 628*l.* 2*s.* 7*d.* In consequence of such report several persons, namely, &c. (these persons were specifically named in the declaration) and *May*, the vestry clerk (meaning plaintiff) were appointed to examine into the identity and accuracy of the said bills; and the aforesaid persons (meaning the said persons so appointed as aforesaid, including plaintiff) did pass the amount of the said bills in three specific sums for payment, notwithstanding they well knew at the time that the real and true amount of the law and other expenses which the committee had altogether incurred amounted to no more than 503*l.* 2*s.* 7*d.*, instead of 628*l.* 2*s.* 7*d.*, of which only 243*l.* 2*s.* 8*d.* ought to have been taken out of



the poor's rate fund, whereas 628*l.* 2*s.* 7*d.* was actually taken. This vestry, therefore, deem the conduct of the aforesaid persons highly censurable, and they, in the most unqualified terms, censure them accordingly; but as respects the conduct of Mr. *James May*, the vestry clerk (meaning plaintiff) and legal adviser of this parish, who not only concurred in this transaction, but actually furnished a bill, paid before the vestry knew of the prosecutions, and incorporated it in his own hand-writing with the unpaid law expenses of the committee; he also signed his name, as testifying to the truth of the printed receipts and disbursements of the parish, in which were inserted the two fictitious bills under the denomination of Messrs. *Knight* & *Freeman*'s bills; as also a charge of upwards of 630*l.* for weekly payments to out-door poor, when they never received a farthing of it, and of which 113*l.* 9*s.* 3*d.* was expended by himself (meaning plaintiff) and other persons, called constituted authorities, in eating and drinking; this vestry therefore consider Mr. *James May* (meaning plaintiff) as most unworthy of their future confidence and support" (meaning that plaintiff, in the examination and allowance of, and in his conduct and proceeding with respect to the said bills and accounts, supposed to have been incurred for and on behalf of the said parishioners, acted corruptly and fraudulently as vestry clerk of the said parish). Pleas—first, the general issue, not guilty; and second, a justification, alleging the truth of the matters contained in the libel. Issue on both pleas. At the trial before *Abbott*, C. J., at the adjourned *Middlesex* Sittings after *Easter* Term, 1823, the libel set forth in the declaration being produced in evidence, it was objected for the defendant that there was a fatal variance between the evidence and the record; for that the declaration averred that certain prosecutions had been preferred against Mr. *Merceron*, and that *in furtherance of such proceedings, and to bring the same to a successful issue,* certain sums of money belonging to the parish were appropriated to the payment of the expenses, whereas the libel read in evidence alleged that the money

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had been so appropriated *after* the termination of those prosecutions. The learned Judge overruled the objection, but reserved the point, giving the defendant leave to move to enter a nonsuit. It was then proposed for the defendant to put in evidence certain other libels said to have been published of him by the plaintiff, but which did not bear reference to the same subject as that of the libel upon which the action was brought. The learned Judge refused to receive any particular libels in evidence, but he admitted evidence of a general nature to shew that, before the libel in question was published, the plaintiff had published other libels of the defendant. The Jury having found a verdict for the plaintiff upon both pleas,

Copley, A. G., in *Trinity* Term last, obtained a rule nisi for a nonsuit or a new trial upon both points; against which

Scarlett, Gurney, and *Holt,* now shewed cause. In order to support this verdict, the plaintiff must make out two propositions; first, that there is no variance, and second, that the evidence rejected was in its nature inadmissible, and therefore properly rejected. First, as to the variance. The allegation objected to is, that the libel was published "of and concerning the matters aforesaid." Now "the matters aforesaid" are mere introductory circumstances, forming part of the inducement, and not constituting any part of the description of the libel itself, therefore an allegation relating only to them need not be proved to the letter; for a declaration in an action of tort is sufficiently supported by evidence of the same cause of action as that set out, and it is unnecessary to prove in totidem verbis all the particulars of the charge. *Yarley* v. *Turnock* (a), *Figgins* v. *Coggswell* (b), *Ricketts* v. *Salwey* (c), and Lord *Churchill* v. *Hunt* (d). This is a divisible, not an entire, allegation; consequently proof of a part of it is sufficient. *Rex* v. *Hunt* (e), *Rex* v.

(a) Palmer, 260. (b) 3 M. & S. 369. (c) 2 B. & A. 360.
(d) Id. 685. (e) 2 Campb. 583.

Sutton (*a*), and *Richards* v. *Peake* (*b*). But even if this observation did not apply to this allegation, and it could properly be said to form part of the description of the libel itself, still if the thing there described is a matter immaterial to the nature and character of the libel as such, it may be rejected as surplusage and need not be proved. Now, what is the nature and character of the libel, and what does it charge against the plaintiff? The libel amounts in substance to an imputation that the plaintiff fraudulently and dishonestly concurred in applying certain sums of money belonging to the parishioners to defray the expenses of certain prosecutions which had been instituted against Mr. *Mercerou*. Whether those prosecutions had been brought to a close before, or after the period when the fraud imputed to the plaintiff is charged to have been committed, is a perfectly immaterial fact; for the date of the transaction can neither vary the nature of the fraud, nor the injurious tendency of the imputation, nor the amount of damages to which the plaintiff would be entitled. Even where a written instrument is set out upon the record, the production of an instrument similar in all its material parts to that set out, is sufficient to support the declaration; *Draper* v. *Garratt* (*c*). That was an action on the case against the Sheriffs of *Middlesex* for taking insufficient pledges in a replevin bond. The declaration set out the record in the replevin suit, and averred, under a videlicet, that the plaint was levied at the County Court, before *A.*, *B.*, *C.*, and *D.* (naming them), as suitors of the said Court. At the trial it appeared from the record that the plaint was in fact levied before *E.*, *F.*, *G.*, and *H.*, and it was contended that this was a fatal variance, because, as the plaintiff had undertaken to set out the whole record, he was bound to set it out correctly, even though it was unnecessary to set out the particular part in question. The Court, however, held the variance to be immaterial, because the names of the suitors, being an immaterial circumstance, need not have been set out at all, and therefore

(*a*) 4 M. & S. 532. (*b*) Ante, 572. (*c*) Ante, vol. iii. 226.

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might be rejected as surplusage. That case, therefore, is decisive of the present; for as the particular time when the money was fraudulently applied was an immaterial circumstance, it was not necessary to state it in the declaration, and the allegation may be rejected as surplusage, and therefore constitutes no variance. *Rex* v. *Horne* (a) will be cited and relied on by the other side, but it is not an authority for the present case. There, with reference to the libel then before the Court, the allegation that it was published "of and concerning the King's government, and the employment of his troops," was entire and indivisible, for either the libel must have alluded to troops employed by the King's government, or it could not have alluded to the King's government at all. Here, the allegation, that the libel was published "of and concerning the matters aforesaid," is a divisible proposition, having reference to several distinct subjects; and when the plaintiff had proved that the libel was published of and concerning so many of the matters aforesaid as constituted the substance of the charge, and filled up the character of the libel, he had done all that was necessary. Secondly, as to the evidence rejected. In an action for one libel, other and particular libels published by the plaintiff of the defendant cannot be admissible as evidence, either as a defence to the action, or with a view to reduce the amount of damages. The admission of such evidence would lead to great inconvenience, for the Jury, instead of trying "the issue joined between the parties," the only office for which they are empanelled and sworn, would, in effect, be trying several other distinct matters, each of which ought to form the subject of a distinct issue and trial. It would also necessarily lead to great injustice; the plaintiff, under such circumstances, would be taken by surprise, for, as he would not be previously apprised of the nature of the libels intended to be proved, he would not have the means of providing himself with an answer to them, and might thus be defeated even when he had a just and sufficient cause of

(a) Cowp. 672.

action (*a*). On both points, therefore, the plaintiff in this case is entitled to retain the verdict, and consequently this rule must be discharged.

Copley, *A. G.*, *Brougham*, *Abraham*, and *F. Kelly*, contrà. The general proposition, that a declaration in tort, or an indictment, may be supported by proving a cause of action accrued, or an offence committed, substantially the same as that set out on the record, may be conceded as true. Such a concession, however, will not assist the present plaintiff, because he has, by his mode of declaring, cast upon himself the burthen of proving that which he has been unable to prove, namely, the publication of a libel precisely and literally the same as that which he has set out. In alleging that the libel was published "of and concerning the matters aforesaid," he has given a description of the libel itself, and has consequently undertaken to prove a libel relating to all the matters previously detailed. One of those matters is, that certain sums of money belonging to the parishioners had been appropriated to the discharge of the expenses of certain proceedings against Mr. *Merceron*, "in furtherance of such proceedings, and to bring the same to a successful issue;" therefore one of the necessary proofs was, the publication of a libel, which charged the misappropriation of the money to have taken place, before the proceedings against Mr. *Merceron* had been brought to issue. In this view of the case, *Rex* v. *Horne* is an authority expressly in point. It was there held, first by Lord *Mansfield*, and afterwards by *De Grey*, C. J., that in order to support the allegation "of and concerning the King's Government and the employment of his troops," proof of the publication of a libel relating both to the King's government *and* to the employment of his troops, was necessary; and the latter learned Judge there said, "If the Jury, upon the defence set up, had found that the libel was not published relative to the King's government, or the employment of his troops; the information was not proved: for it contains an *entire* propo-

(*a*) Vide *Waithman* v. *Weaver*, 1 Dowl. and Ryl.'s N. P. C. 10.

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sition. And if it had appeared that the paper related to a *voluntary* act of the troops only, and not to an employment of them by government, the information would have been false; because the prosecutor would have failed in the proof of the proposition, that it was written *of and concerning the King's government and the employment of his troops.*" *Teesdale* v. *Clement* (*a*) is another case directly in point with the present. That was an action for a libel, which was set forth in the declaration, "stating that plaintiff, a constable, had apprehended persons stealing a dead body, and had carried the body to Surgeons' Hall, and that defendant published the libel of and concerning plaintiff's said conduct; second count, that defendant published a certain other libel of and concerning the conduct of the plaintiff respecting *the said dead body*;" and it was "held necessary, in support of both counts, to prove, that the plaintiff had carried the body to Surgeons' Hall." *Shepherd* v. *Bliss* (*b*) is to the same effect. That was an action for words spoken by defendant's wife, of the plaintiff, charging him with having stolen some soap. The declaration alleged that the words had been spoken of and concerning certain soap which *Bliss* had asserted to have been *stolen* out of his yard. It appeared in evidence that *Bliss*, before the speaking of the words upon which the action was founded, had asserted that the soap had been *taken* out of his yard, and *Abbott*, C. J. was of opinion that the variance was fatal. Then, with reference to the second point, the libels published by the plaintiff of the defendant were admissible in evidence, if not as an answer to the action, at least in mitigation of damages. Similar evidence was admitted by Lord *Kenyon* in *Anthony Pasquin*'s case, (which, though not reported, is alluded to in *Tabart* v. *Tipper* (*c*) and *Finnerty* v. *Tipper* (*d*), not only in mitigation of damages, but in bar of the action; and in *Finnerty* v. *Tipper*, libels published by the plaintiff of the defendant were received by *Mansfield*, C. J. though in miti-

(*a*) 1 Chit. Rep. 603. (*b*) 2 Stark. 510.
(*c*) 1 Campb. 350. (*d*) 2 Campb. 72.

gation of damages only. These, indeed, are only nisi prius decisions; but they have never been overruled or impeached, and therefore they are in every point of view intitled to respect. So far as justice, and the interests of the parties are concerned, the production of the libels themselves seems infinitely less calculated to work any mischief, than the admission of general evidence of the fact, that the plaintiff had published libels of the defendant; for in the latter case the witnesses are permitted to give parol evidence of the contents of written documents, and to express their own opinion and judgment of their character, whereas in the former, the writings themselves being produced, the jury are enabled to estimate them according to their actual contents, without the intervention of the passions or prejudices of third persons.

ABBOTT, C. J.—I am of opinion that there is no weight in either of the objections that have been raised in this case. The first is founded upon a variance supposed to exist between matter of fact alleged in the declaration, and matter of fact proved at the trial; for it is not contended to be a variance between the contents of a written instrument as set out on the record, and a written instrument as proved upon the evidence. It is a general rule that a variance between the declaration and the evidence is not fatal, unless it bears reference to a fact, which, if pleaded, would have been material to the cause of action; and therefore the question here is, whether the fact to which the supposed variance bears reference, was, as respects the libel itself, in any way material to the cause of action. What is the fact alleged? That certain prosecutions had been instituted against Mr. *Merceron*, and that in furtherance of those proceedings, and in order to bring the same to a successful issue, certain sums of money belonging to the parish had, with the concurrence of the plaintiff, been appropriated to the discharge of the expenses. Now, as respects the libel itself, and the misconduct which it imputes to the

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plaintiff, it is perfectly unimportant whether the money belonging to the parish, and appropriated to the discharge of the expenses attending the prosecutions, was so appropriated, before, or after, those prosecutions had been brought to issue. Then, according to the general rule already mentioned, this variance between the declaration and the evidence will not be fatal, unless the plaintiff has put upon the record some other matter, which makes it incumbent on him to prove the allegation precisely and literally in the language of the declaration. It has been argued that the plaintiff has imposed upon himself that burthen, and has, by the structure of his declaration, rendered it necessary to prove that the libel does refer to all the introductory matters stated; and that by averring that the defendant published a libel "of and concerning the matters aforesaid," he has undertaken to prove, and therefore must prove, that the matters aforesaid, one and all, are referred to by that libel. I cannot, however, go the length of that argument; on the contrary, I think the plaintiff has proved all he has undertaken, and all he is bound to prove, when he has shewn that the libel refers substantially to the introductory matters previously detailed, and in such a degree as not to alter the defamatory character and tendency of the libel itself. *Rex* v. *Horne* has been cited on the part of the defendant, and it has been said that the words "of and concerning the king's government and the employment of his troops" were there held to connect the libel both with the king's government, and the employment of his troops. And so, unquestionably, they did; and for that reason it became necessary to find something on the record shewing the libel to be a libel relating both to the king's government and the employment of his troops; because, in the absence of such proof, the libel itself, as far as regarded its alleged reference to the king, might have been perfectly innocent, inasmuch as it would have wanted that defamatory character which was imputed to it by the introductory averment of the information. *Teesdale* v. *Clement* was also relied on for the defendant;

but that case was decided upon the ground, that the plaintiff was not in a situation to prove a fact alleged in his declaration which was material to the essence of the libel as respected its defamatory nature; whereas here the fact which the plaintiff was unable to prove, was, as I have already shewn, wholly immaterial to the character and tendency of the libel. Several other cases have been cited in the course of the argument, but they do not appear to me to affect the present. The utmost effect that can be given to them seems to me to be this, that the learned judges before whom they were tried inclined to the opinion that all that came after the words "of and concerning" must be precisely proved as laid. I myself have at times inclined to the same opinion, and in the case of *Lewis* v. *Walter* I believe I so ruled; but that was only a nisi prius decision, and upon more careful and deliberate consideration I now think that the former decisions of that kind have received more weight than they are properly intitled to. Upon the whole, therefore, I am of opinion that the plaintiff here did prove as much of his allegation as was requisite to maintain his action, although the words "of and concerning" in one part of that allegation had reference to introductory matter previously set out. The second objection is, that I rejected evidence on the part of the defendant, which, it is said, I ought to have admitted. When the nature of that evidence is considered, I think it will appear that it was properly rejected. It consisted of several distinct and particular libels which it was alleged the plaintiff had published of the defendant, neither of which, however, was even represented as the provocation to the particular libel which was the subject of the present action. I was of opinion at the trial, that, unless the libels tendered in evidence were shewn to be directly connected with the subject matter of the libel complained of in the declaration, they were not admissible. It was not then, nor is it now contended, that they had any such connection, and it must now, therefore, be taken for granted that they had not. Then this simple question arises,

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whether when I have brought an action against a man for libelling me, it is competent for him, in answer to that action, to prove that I have libelled him at different times and on different subjects. The inconvenience which must result from allowing such a mode of defence, has been well described in argument, and every man who understands the nature and course of a trial by a jury, who are summoned and sworn to try "the issue joined between the parties," and no more, must feel that such a practice would prove extremely inconvenient indeed. The argument ab inconvenienti is not indeed conclusive upon such a subject, but in considering whether evidence of a particular kind ought or ought not to be admitted under particular circumstances, it is by no means unimportant to see to what inconvenience its admission would lead. Now if I had admitted the evidence tendered in this case, the result would have been this: the minds of the jury would have been perplexed and distracted with a variety of facts, questions and issues, all dehors the issue they were trying; and the plaintiff would have been taken by surprise by the introduction of circumstances entirely unconnected with the record, of which he had no previous notice, and to which therefore he would have had no possible means of providing himself with an answer. But, it is said, as I admitted general evidence of the fact that the plaintiff had libelled the defendant, I was bound, by the rules of consistency, to admit also the libels themselves; and that the introduction of the libels themselves would have had a tendency less injurious, than general evidence that such papers had been published. To this it is enough to answer, that the question now before the court is not whether the general evidence was or was not admissible: if it were, I, for one, should certainly pause before I gave a solemn opinion upon the point. With respect to the libels themselves, I am clearly of opinion, that as they did not appear to relate to the subject of the libel for which the action was brought, they were not admissible in evidence, either in bar of the action, or in mitigation of damages, and there-

fore that I acted correctly in refusing to receive them; and consequently it appears to me that this rule ought to be discharged.

Bayley, J.—I am of opinion that the evidence rejected by my Lord Chief Justice at the trial was properly rejected, and that in receiving general evidence of the fact that the plaintiff had before then libelled the defendant, he went the whole length which the law would allow him to go. In order to decide what is or is not evidence, it is necessary to consider the real issue joined between the parties, because facts which do not relate to that issue cannot be received as evidence. There are circumstances under which general evidence may be received, when the evidence of a particular fact cannot; as, when the credit of a witness is in doubt, general evidence that he is not to be believed upon his oath is admissible, though evidence that his credit has been destroyed by the commission of a particular crime, is not. In this case there were two issues joined; first, whether the defendant did or did not publish the libel, and second, whether the libel was or was not true: and, keeping in view the distinction between particular and general evidence, it seems to me, that no particular evidence was admissible which did not relate to one or other of those issues. And this is founded in justice and reason; for the admission of particular facts unconnected with the issue would not only lead to general inconvenience, but would be highly prejudicial to the party against whom it is produced. When a cause is ripe for trial, the party, knowing what the issue is, knows also on what points to prepare his proofs; and though he may thus be prepared upon general points unconnected with the issue, he certainly would not be so upon particular points. For instance; an action is brought for a libel, and the defendant proves in answer, that the plaintiff at a different time published a different libel of him; then two questions would arise, first, whether the plaintiff did publish the libel, and second, whether the libel was true; and thus in

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an action for one libel questions would be tried, which would properly form the issue in another action for another libel: and besides, as the defendant would not be limited in number, but might prove twenty different libels, as well as one, twenty different issues would be tried at once, and the inconvenience and perplexity of all parties would be inconceivable. With respect to the supposed variance, the question is, what is the effect of the words "of and concerning" following the introductory matters stated in the declaration; because, if the allegation, that the libel is of and concerning those matters, renders it necessary to prove that it relates individually to every one of them, undoubtedly the present plaintiff has failed in his proof, and ought to have been nonsuited. I am of opinion that those words have no such effect in this case, and that the plaintiff has proved all that they make it necessary for him to prove, when he has put in evidence a libel relating to those matters, only so far as they on their part relate to the libel, with respect either to the defamatory character attributed to it by the declaration, or to the mode in which it is subsequently set out. If, in setting out the libel, the plaintiff had connected it by innuendoes with particular allegations, he must have proved that the libel had reference to the subject matter of all those allegations: but that he has not done. For some time I inclined to the opinion that the decision in *Rex* v. *Horne* went all the length contended for in argument, but I am now satisfied that it does not, and that it is distinguishable from this case. It was indeed laid down by *De Grey*, C. J. there, that the words "of and concerning" made it obligatory upon the prosecutor to prove that the libel was published "of and concerning the king's government, and of and concerning the employment of his troops," and that if he had failed in establishing either part of that allegation, he must have failed altogether. But there the allegation was entire and indivisible. If it had not been so, if it had comprehended two distinct and separate propositions or branches of a proposition, then that case would have been an authority for saying,

that an allegation which was "of and concerning the matters aforesaid", required proof that it was "of and concerning" each of those matters: but as the libel referred to one entire proposition, no such conclusion can be drawn. The information charged that the defendant, intending to excite discontent and sedition among his majesty's subjects, published the libel of and concerning his majesty's government and the employment of his troops, and the employment of the troops was properly construed to be, the employment of them by his majesty's government. The libel, indeed, did not mention his majesty's government; it merely stated that innocent subjects had been inhumanly murdered by the king's troops: but unless those troops acted under the employment of his majesty's government, there was no libel upon his majesty's government, and therefore the allegation that the libel was published "of and concerning the king's government, and of and concerning the employment of his troops," formed one entire, indivisible proposition, every part of which it was necessary for the prosecutor to prove. And in this light *De Grey*, C. J., represents it, for he says, "If the averment, therefore, amounts to this, that in the discourse which was held, the words were said '*of and concerning the king's government*;' the natural import of them, without any forced or strained meaning, appears to us to be this: I am speaking of the king's administration of his government, relative to his troops, and I say that our fellow subjects, faithful to the character of Englishmen, and preferring death to slavery, were for that reason only inhumanly murdered by the king's order; or the orders of his officers." Then as *Rex* v. *Horne* does not apply to this case, there is no case to be found which has decided, that an averment that the libel is "of and concerning the matters aforesaid," makes it necessary for the plaintiff to prove a libel which relates individually to all the matters set out in the introductory part of the declaration. Now the introductory matter in this declaration, to which it is contended the libel does not relate, appears to me to be wholly immaterial to the

nature and character of the libel, and it certainly is not connected with it by any innuendo. The declaration states, "that certain prosecutions were prepared and carried on against one *Joseph Merceron*, and that in furtherance of such proceedings, and to bring the same to a successful issue, certain sums of money belonging to the parishioners were appropriated and applied to the discharge of the expenses and law charges incurred on account of the said proceedings." Now, it is contended that this allegation implies, that the money was thus appropriated while the prosecutions were in progress; that upon the evidence it appeared that it was so appropriated after the prosecutions had terminated; and that so there is a fatal variance. The answer to this argument is, that the period at which the money was appropriated is perfectly immaterial, and has no sort of effect upon the nature and character of the libel. The substantial charge against the plaintiff is, that he debited the parish with a sum of 628*l.*, when a sum of only 503*l.* was due, and when a sum of only 243*l.* ought really to have been charged to the parish; and that is equally a libel, and the dishonesty imputed to the plaintiff is precisely the same, whether the misappropriation of the money took place during the progress of the law proceedings, or after their termination. I am therefore of opinion that the evidence rejected was properly rejected, that there is no variance, and that this rule ought to be discharged.

HOLROYD, J.—I am of opinion that neither of the objections in this case is tenable. In the first place, I think the evidence rejected was clearly inadmissible. Serious inconvenience must result, if, in an action for one libel, evidence of other libels published by the plaintiff of the defendant were to be received. The issue joined between the parties, and which the jury were sworn to try, was, whether the defendant had published the particular libel of which the plaintiff complained; and whether the plaintiff had or had not published other libels of the defendant was a fact

altogether immaterial to that issue. It is argued that at least the evidence was admissible in mitigation of damages. Now, the effect of admitting such evidence would be that the defendant, by diminishing the damages which the plaintiff would otherwise have recovered against him, would in reality recover damages against the plaintiff; and it would be a strange state of things indeed, if, when the plaintiff is claiming damages for a wrong inflicted on him by the act of the defendant, the defendant should be allowed to recover damages against the plaintiff, for a distinct injury done to him, and alleged and proved at a time when it would be impossible for the plaintiff to be prepared with proof either in justification or mitigation of his conduct. The defendant cannot be intitled to any such privilege; the plaintiff has a right to recover a full compensation for the injury he has sustained through the act of the defendant, whether he has injured the defendant on other occasions or not: and the defendant is not prejudiced by that course, because if he has sustained an injury, he may resort to his legal remedy and recover damages for it, and there the plaintiff will meet him on equal terms, for then he will become the defendant, and will have the fair opportunity of justifying, excusing, or disproving the charge that is brought against him. It has been truly said by my Lord Chief Justice, that the argument ab inconvenienti is not conclusive upon such a subject, but it is nevertheless deserving of great weight, and is peculiarly applicable here, for it is impossible to doubt that the admission of such evidence would conduce to equal inconvenience and injustice, and to much of both. Secondly, I am of opinion that there is no variance. It is not assumed that the objection on this point can be supported, except it amounts to a misdescription of the libel, that is, that one libel is charged in the declaration, and another libel, and of a different nature, proved in evidence. The declaration charges it to be a libel "of and concerning the matters aforesaid;" a general allegation, and one which, in my opinion, ought not to be construed as extending individually to

one and all of the matters aforesaid. In *Rex* v. *Horne*, the allegation charged the libel to be of and concerning the king's government, and that was held not to extend to every branch of the government, but to one particular branch only. It went on to charge that the libel was of and concerning the employment of the king's troops, and that was held to mean not the general employment of all the troops, but the employment of a particular portion of them on a particular occasion. What are the introductory matters in this declaration? First, that the plaintiff was vestry clerk of the parish, and duly appointed by the parishioners; which was proved. Then, that while he continued vestry clerk, certain prosecutions were instituted against Mr. *Merceron* for misdemeanors alleged to have been committed by him; which was proved also. Then, that certain sums of money belonging to the parishioners were appropriated to the discharge of the expenses incurred in the prosecutions, in furtherance of the proceedings, and in order to bring the same to a successful issue; which certainly was not proved. But the character of the libel is the same, whether the money was appropriated with the motive and at the time there mentioned, or not, and therefore that part of the allegation was altogether immaterial, and did not require to be proved. The case of *Young* v. *Wright* (*a*) is illustrative of this position. That was an action by the indorsee of a bill of exchange. The declaration stated the indorsement to have been made *before* the bill became due, but it appeared in evidence to have been made *after* the bill was due; and Lord *Ellenborough* held that it was not a material variance, for whether the bill was indorsed before or after it became due was wholly immaterial, and therefore it was not necessary to prove the indorsement precisely at the time alleged in the declaration. Upon these grounds it seems to me that this rule must be discharged.

Littledale, J.—I am also of opinion that the evidence was properly rejected. It is quite clear that upon the plea

(*a*) 1 Camp. 139.

of not guilty the defendant could not give in evidence libels published of him by the plaintiff, because the only question in issue upon that plea was, whether the defendant had or had not published the libel in question. Then could such evidence be received in mitigation of damages? I think not. In what situation would its reception place the plaintiff? In one of great hardship. He had no notice that such evidence would be produced, and could not be prepared to meet it, whereas the defendant would of course come prepared to substantiate the charge against him; the plaintiff therefore would be placed in a worse situation than if he were really a defendant in an action brought against him on those libels; which would be extremely unjust. Such evidence would amount to a set-off of libels, and would indeed be more injurious to the plaintiff than an ordinary set off; for there the debt is extinguished; because if the defendant by his set-off diminishes the debt claimed against him, the cross demand which he has by those means proved, and had the benefit of, can not be claimed by him in a subsequent action. But here the defendant, by proving the libels, would not only diminish the plaintiff's damages in this action, but might afterwards bring an action against the plaintiff for the very same libels, and thus obtain a double remedy, to which he cannot be intitled. By the common law a set-off is not allowed at all, and where it is allowed by the statute, the plaintiff must always be informed of what the set-off consists, either by the plea or the notice; so that if this evidence were admitted the plaintiff would stand in a less advantageous situation than the plaintiff in the ordinary case of a set-off of a debt. The same principle that would authorize the admission of such evidence in an action for a libel, would authorize it also in an action for an assault, and the defendant in the latter case would be intitled to prove, in answer to the action, or in mitigation of damages, that the plaintiff had previously committed an assault upon him. It seems, therefore, that such evidence is inadmissible on two grounds; first, because the plaintiff cannot have notice of the defence

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intended to be set up, and consequently is put to great disadvantage; and secondly, because such a practice would lead to great inconvenience, by introducing into every case a variety of issues not raised on the record. Secondly, I am of opinion, that there is no variance in this case. In an action for a libel the declaration must set forth three things—the libel itself, the period of its publication, and that it has relation to the plaintiff; but if the libel mentions the plaintiff by name, or describes him in a particular character, it is not necessary to aver that the libel relates to him eo nomine, or in that particular character. Now here the libel points out the plaintiff as "Mr. *May*, the vestry clerk," and therefore it was not necessary to aver that it related to him in those particulars. Where a plaintiff, in an action of this kind, is desirous of shewing that he has sustained additional injury in respect of any particular character or station in life which he filled, or any other circumstance which would give him a claim to damages, he must aver that circumstance, or that he did fill that station or character, before he can claim a higher measure of damages for the particular imputation so cast upon him. Here the plaintiff does claim damages for the imputation cast upon him in his character of vestry clerk, because he states in his declaration, "that while he was such vestry clerk, certain prosecutions were prepared and carried on against one *Joseph Merceron*, and that in furtherance of such proceedings, and to bring the same to a successful issue, certain sums of money belonging to the parishioners were appropriated and applied to the discharge of the expenses and law charges incurred on account of the said proceedings." His object in making this averment is to shew, that some part of the libel relates to him in his character of vestry clerk; and in order to recover damages for the injury he has sustained in that charater, he must prove that averment; though, if he fails to prove it, he is still intitled to damages for the injury he has sustained in his private and personal character. He then proceeds to shew the malicious motives with which the

libel was published, and he states "that the defendant, intending to injure the plaintiff in his said business and profession of an attorney, and to cause him to be esteemed and taken to be a dishonest, corrupt, and fraudulent practiser in his said business and profession, and in his office and situation as vestry clerk, and to be a person unfit to be trusted therein, and to deprive him of the same, and to cause it to be suspected and believed that the plaintiff had fraudulently and clandestinely appropriated and applied certain sums of money of and belonging to the parishioners," composed and published the libel: complaining therefore, that the tendency of the libel is to injure him in his private character, and in his character of attorney and of vestry clerk, and to make it suspected and believed that he had fraudulently appropriated the parish funds. He then adds, that the libel was published "of and concerning the plaintiff, and of and concerning his conduct in his office and situation of vestry clerk, and of and concerning the matters aforesaid." Now I take the operation of the concluding words, "of and concerning the matters aforesaid," to be no more than this, namely, to connect the libel subsequently set out with such parts of the preceding averments as describe the particular defamatory tendency of the libel; and it seems to me, therefore, that the plaintiff was only obliged to prove a libel having that tendency, namely, a libel imputing to him a fraudulent appropriation of the parish funds. It has been argued that this averment, that the libel was published "of and concerning the matters aforesaid," amounted to a specific description of the libel itself, and therefore that the matters aforesaid, that is, the introductory statements of the declaration, ought to have been proved to the letter: but I think the argument fails, because I consider the averment, not as a description of the libel, but as a description of the injury of which the plaintiff complains. Reddendo singula singulis, this averment may, as it strikes me, be considered, as if the words "of and concerning" had followed every one

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of the previous averments; and if the declaration had stated that certain prosecutions had been preferred against *Merceron*, and that in furtherance of the proceedings, and to bring the same to a successful issue, money belonging to the parishioners had been appropriated to defray the expenses, and had then averred that the libel was published of and concerning the matters aforesaid, I think that averment would not have applied to all the matters previously detailed, but only to such of them as materially assisted in pointing out the particular defamatory character of the libel, and shewing it to be the same as that attributed to it by the declaration. The misconduct imputed by the libel is the mal-appropriation of the parish funds, and whether that took place pending the prosecutions, or after they had terminated, is altogether immaterial. In *Rex* v. *Horne* the averment formed one entire proposition, and the allegations were not divisible; but here, the averment is divisible into several propositions, and the allegations are completely separate and distinct. The case of *Peppin* v. *Solomons* (*a*) may be mentioned as another authority to shew that this is not a material variance. That was an action upon a policy of insurance, and the declaration stated, that *after* the making of the policy the ship sailed. The evidence was that she sailed *before* the policy was made, and the court held the variance to be immaterial, because it was immaterial to the merits of the action whether she sailed before or after. For these reasons I am of opinion, that this averment did not make it necessary to prove the whole of the matters previously alleged, and that, even if it did, still sufficient evidence was given in support of the only material allegation upon which the question in issue arose.

Rule discharged.

(*a*) 5 T. R. 496.

Tuesday, June 29.

Willson v. Abbott.

Defendant hired of plaintiff apartments in his dwelling house at a fixed rent, payable half yearly, and entered into possession at *Michaelmas*, 1822. At *Lady-day*, 1823, he paid one half year's rent, and at the *Midsummer* following gave up possession without having given any notice to quit, but at *Michaelmas* in the same year he paid another half year's rent. At *Lady-day*, 1824, plaintiff demanded a third half year's rent, which defendant refused to pay. In an action of use and occupation, for that half year's rent: Held, that a tenancy from year to year could not be inferred from these facts, and therefore that the action was not maintainable.

THIS was an action of assumpsit, to recover one half year's rent for the use and occupation of apartments. Plea, non assumpsit, and issue thereon. At the trial before *Abbott*, C. J., at the *London* Adjourned Sittings, after last Term, it appeared that the plaintiff, at *Michaelmas*, 1822, had let the apartments in question, being a portion of his own dwelling house, to the defendant at a rent of 45*l.* payable half yearly. The defendant entered upon the apartments at *Michaelmas*, 1822, and paid half a year's rent at the *Lady-day* following, but, on the 23d *June* following, left them, without giving any notice to quit. He then tendered the plaintiff a quarter's rent up to *Midsummer*-day, which was refused; and at *Michaelmas* the plaintiff demanded half a year's rent, which the defendant paid. At *Lady-day*, 1824, the plaintiff demanded another half year's rent, which the defendant declined paying, and the present action was brought. No evidence was given of any agreement at the time when the apartments were taken from which it could be collected whether the taking was for one year certain, or from year to year; and the learned Judge was therefore of opinion, that there was not sufficient proved to found an inference that there had been a taking from year to year; if indeed the defendant's possession had continued into a second year, his Lordship thought a taking from year to year might have been inferred, but as that was not the case, the defendant was not liable to pay rent for the second year, and consequently the plaintiff had no remedy in this form of action. The plaintiff was therefore nonsuited.

Chitty now moved to set aside the nonsuit and for a new trial. It is a doctrine as old as the reign of *Henry* the Eighth, that a general occupation, that is, an occupation without an agreement for any specific term, must be consi-

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dered an occupation from year to year; and that a tenant so holding cannot be ejected without a half year's notice to quit, from his landlord. This is the law with respect to lands, and there seems no reason why it should not equally apply to houses or apartments. Then, in this case, there was enough proved from which to imply an agreement for a tenancy from year to year; for the plantiff proved a general occupation of the apartments by the defendant at an annual rent, and it was for the defendant to rebut the presumption thus raised, by shewing that there was an agreement for something short of a tenancy from year to year. It is quite clear that in the state of things existing between these parties, the plaintiff could not have maintained ejectment against the defendant, without giving him a half year's notice to quit, and therefore it seems but reasonable that an equal duty should be imposed upon the defendant, and that he should not have it in his power to determine the tenancy without also giving a notice to quit. He cited *Adams on Ejectment* (a), *Right* v. *Darby* (b), and *Bishop* v. *Howard* (c).

ABBOTT, C. J.—In the case last cited, there was payment of rent for a portion of the second year of the occupation, which essentially distinguishes that case from the present. I believe no instance can be found, even where land was the subject of the occupation, where the Courts have held that a tenancy from year to year could be created, except by the existence of some contract between the parties, or by a payment of rent beyond the first year. In this case there is neither the one nor the other; and here the premises occupied are only lodgings, which are rarely the subject of a yearly letting. It seems to me therefore that there was no tenancy from year to year, either created by any express contract, or to be inferred from the facts proved in this case, and that the nonsuit consequently was right.

(a) Page 97. (b) 1 T. R. 162.

(c) Ante, vol. iii. 293.

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HOLROYD, J. (a).—There is no ground for this application. Generally speaking, lodgers are inmates, not tenants; there is in law no change of possession from the master of his house to his lodger, so as to constitute the relation of landlord and tenant. Even if there is an agreement between them, still it forms an engagement of a personal nature, rather than a contract respecting the property itself. In a case like this, there must be a payment of rent into the second year, in order to constitute a yearly tenancy, and to support an action for use and occupation.

LITTLEDALE, J. concurred.

Rule refused.

(a) *Bayley*, J. was absent.

M'GREGOR v. THWAITES and Another.

Tuesday, June 29.

Where to a declaration for a libel in a newspaper, defendants pleaded first, that the libellous matter was a true and correct account of a statement made by A. and B. before a magistrate; and second, that the facts therein stated were true; and the jury found for defendants on the first plea, and for plaintiff on the second: Held, that plaintiff was entitled to judgment non obstante veredicto on the first plea, on the following grounds: 1. The statement, though correct, did not relate to a matter of which the magistrate had cognizance; 2. The defendants had printed and published that which would not have been actionable as oral slander, and consequently were not protected by giving the names of the authors at the time of publication; and 3. Supposing the matter actionable as oral slander, defendants had not by their plea offered themselves as witnesses to prove the words against the authors.

THIS was an action for a libel of and concerning the plaintiff, alleged to have been published by the defendants in the *Morning Herald* Newspaper, in the form of a report of certain proceedings in the Justice Room at the Mansion House of the city of *London*. The first count of the declaration stated, that the defendants maliciously intending to bring plaintiff into odium and disgrace, and to cause it to be believed that he had wilfully made use of false representations, to induce certain persons to emigrate to *Poyais*, on the Mosquito shore in *America*; and to cause it to be believed, that he had defrauded the said persons of money, published the following matter:—" *Mansion House.*—Yesterday Mr. *Prince*, a Common Councilman, with Captain *Antrim*, of the ship *Lloyds*, waited upon the Lord Mayor elect, (who sat for the Lord Mayor,) to request his Lordship's advice as to the disposal

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of three orphan children, who had been brought on shore under the following melancholy circumstances. Captain *John Antrim* stated, that on the 31st of *July* last he sailed from *Honduras*. Before he departed from that settlement, he consented to receive on board one of the families of the unfortunate *Poyais* settlers, the remnant of whom had sought the protection of the *British* authorities at *Honduras*, and had received all the succour which the governor had in his power to give them. The unfortunate creatures who had survived the effects of their short residence at the desert swamp to which they had been taken, were sent back by the different vessels which sailed from *Honduras*. The family which Captain *Antrim* consented to receive, consisted of *Thomas Chalmers*, his wife, and three children. The husband and wife, when received on board, were both ill with the fever, and died in the course of the passage. The Captain said he had landed the three orphans, who were utterly destitute, at *Poplar*, and he now requested his Lordship's advice as to the best means of getting them provided for. The Captain then handed in the following certificate to his Lordship." The libel then set out the certificate alluded to, which stated, that the persons therein mentioned were taken on board from motives of charity. Several questions put by the Lord Mayor elect to Mr. *Prince* and Captain *Antrim*, together with the answers thereto, were also set out; and after mentioning that the Lord Mayor elect had recommended an application to the parish officers to relieve the children, it proceeded as follows:—" Mr. *Prince* observed, that the Captain, in consequence of his charity in receiving the poor emigrants, had himself caught the fever and had narrowly escaped. He stated, that above two hundred of the victims of delusion had returned from the *Mosquito* shore to *Honduras*, in a state of utter destitution and disease, which terminated the sufferings of a great part of them soon after. They must all have died but for the charity of the people and the authorities of *Honduras*. The poor creatures had been led by *M'Gregor* to expect a land where they would live in the greatest plenty, where every

thing was flourishing, and but little labour would be required. It was mentioned to them as a mark of the improvement of the place, that a fine theatre had been established and other establishments formed, indicative, not merely of civilization and comfort, but of luxury. Captain *Antrim* mentioned a charge which the poor creatures had preferred to him against *M'Gregor*. Most of those who sailed from *Leith* were poor people who had, by their frugality, saved small sums of money, from fifteen to thirty pounds. *M'Gregor* learned the property the settlers had with them; and telling them that *Scotch* money would not pass at the settlement, persuaded them to give it all up to him, and take his drafts for the amount upon his banker at *Poyais*. The savings were all given up to him, and perhaps it is unnecessary to add, that the settlers on their arrival at the houseless wilds of *Poyais*, found that no such thing as a banking-house was in existence. Captain *Antrim* regretted that he had not arrived sooner, as another ship had sailed with settlers for the same place just before his arrival, who, he feared, would also fall a sacrifice. He had thought it his duty to make this statement publicly, that the poor might be put on their guard." Second count commenced by stating, as matter of inducement, that certain persons had emigrated from *Great Britain* to *Poyais*, on the *Mosquito* shore, with the intention of forming a settlement there, and on their arrival at *Poyais*, had undergone great sufferings from sickness, disease, and other accidents, whereof some of them had died, and many others had been thereby compelled to remove to *Honduras*, and from thence had returned to *Great Britain*; and that shortly before the committing of the grievances in that and the next count mentioned, an application was made to the Lord Mayor elect of the city of *London*, at the *Mansion House*, in the said city, by certain persons, to wit, one Mr. *Prince* and one Captain *Antrim*, relative to certain children of certain of the said emigrants, yet defendant, further contriving and maliciously intending to defame, injure, and aggrieve the plaintiff, pub-

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lished the matter following. The count then set out that part of the alleged libel contained in the first count, commencing with the words, "Mr. *Prince* observed, that the Captain, in consequence of his charity in receiving the poor emigrants, had himself caught the fever, &c." Third count the same as the second, setting out the part of the libel commencing with the words, "Captain *Antrim* mentioned a charge which the poor creatures had preferred to him against *M'Gregor*, &c." Pleas—first, not guilty; second, which went to the whole declaration, that on the 13th *October*, 1823, at the *Mansion House* in the said city, one Mr. *Prince*, a Common Councilman, with Captain *Joshua Antrim*, of the ship *Lloyds*, did wait upon the Lord Mayor of the said city of *London* elect, who sat for the Lord Mayor, to request his Lordship's advice as to the disposal of three orphan children who had been brought on shore as stated in the said supposed libels; and the said *Joshua*, on that occasion, then and there did make such statements and mention such charge, circumstances, matters, and things, and hand to his Lordship such certificate as in the said supposed libels are respectively mentioned, and the said Lord Mayor elect did then and there ask such questions and make such statements as in the said supposed libels are also in that behalf mentioned, to which questions such answer was given as therein is mentioned; and the said Mr. *Prince* did also make such observations as therein are mentioned; and the said report in the said newspaper was, and is, a true, fair, and correct account of the said proceedings before the said Lord Mayor elect, and of what took place on that occasion, and the several facts and circumstances therein detailed and adverted to are likewise true, and the said report contains no false or untrue statement or allegation whatever, wherefore the defendant published, &c. Third, that the report or account in the said newspaper of the said proceedings at the said Mansion House, whereof the said supposed libels in the declaration mentioned were and are composed, was, and is, a true, fair,

and correct account of the said proceedings, and which proceedings did actually take place at the said Mansion House as is stated in the said supposed libel, to wit, at &c. Fourth, that the several matters and things in the said supposed libels contained were and are true in fact. Then followed a set of pleas similar to the third and fourth, but pleaded separately to the first and second counts of the declaration. Replication to the first plea took issue, and to the rest there was the general replication, that the defendants had published the libel of their own wrong &c. and issue thereon. At the trial before *Abbott*, C. J., at the *London* Adjourned Sittings after last *Michaelmas* Term, the jury found a verdict for the defendants upon the pleas which averred that the libel contained a true, fair, and correct report of the proceedings which had taken place before the Lord Mayor elect, but for the plaintiff upon the other pleas which averred that the facts stated in the libels were true, with damages, one shilling.

Denman, C. S. in *Hilary* Term obtained a rule nisi to enter up judgment for the plaintiff, with one shilling damages, notwithstanding the finding of the jury for the defendants upon the plea averring the correctness of the report.

Scarlett and *E. Lawes* now shewed cause against the rule. The jury having found a verdict for the defendants on the plea which avers the statement to be a true and correct account of what took place at the Mansion House, it is impossible that the present rule can be sustained; because, though the matter so published by the defendants may be injurious to the plaintiff, and false in the facts, it is a privileged publication, being a true account of what took place before a magistrate. The correctness of the account rebuts the presumption of malice, which might otherwise arise if it were untruly published. If a person maliciously publishes what passes in a court of justice or before a magistrate, knowing it to be false, with a view to prejudice the

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character of another man, it may be conceded that he is guilty of a libel; but this case falls within the principle laid down in *Rex* v. *Wright*(a), and *Curry* v. *Walter*(b), which cases have established this proposition, that it is lawful to publish the proceedings of courts of justice even though they contain matter injurious to the character of another. Here the defendants only profess to give a correct account of what passed before the Lord Mayor. It is not pretended that they had any personal knowledge of the facts there stated, and consequently it cannot be predicated of them, that they knew the facts to be false. It cannot be said that the editor of a newspaper is not at liberty to publish what passes before a magistrate unless he is able to vouch for the truth of every part of his statement. At all events this is the most unfavourable case for the plaintiff in which such a question could be raised, because it appears from the course of the publication itself, that the parties who made the complaint before the Lord Mayor, wished the facts to be publicly stated in order that other persons might derive benefit from the matter which they communicated. [*Abbott*, C. J. But they will say on the other side that this was not matter passing before a magistrate in his official capacity, or even any thing over which the Lord Mayor had any jurisdiction.] That is an objection which might prevail in all cases where what passes before a magistrate is made public. If a correct account of what passes before a magistrate or in a court of justice is not privileged unless the reporter can vouch for the truth of the facts themselves, there must be an end to all such publications. Here the defendants only state what they have heard, and the jury having found that the statement is correct in substance, their finding, in the absence of special malice, is a complete answer to the action. Now here there is no averment on the record, that the defendants published the alleged libel knowing the facts it contained to be false. The question then is, whether a man, who, without malice, and without any improper motive

(a) 8 T. R. 293. (b) 1 B. & P. 525.

whatever, simply publishes in print what one man says to another upon a subject of general importance, and deeply interesting to the public, can be liable to an action unless he can prove the truth of the facts published. [*Bayley*, J. What a man says by oral communication concerning another may not be actionable, unless it is afterwards reduced into writing. Mr. *Prince* and Captain *Antrim* may have said something to the Lord Mayor which perhaps would not be actionable as against them: is the defendant then excused in putting what they said into writing and alleging that he has truly represented what they did say?] If the publication is bonâ fide, it is a sufficient excuse. The circumstance of its being reduced into writing is a mere technical objection and can make no difference if there be no malice. Considering this, not as the publication of what took place before a magistrate or other person having competent jurisdiction, but simply as the repetition of what one man says to another, still it would come within the doctrine of Lord *Northampton*'s case(*a*) inasmuch as the defendants have given up the authors of the supposed slander so as to enable the plaintiff to proceed against them. [*Bayley*, J. But according to that case, you must not only give up the name of the author, but you must shew a cause of action against the party stated to be the author. Now non constat that any action would lie against Mr. *Prince* or Captain *Antrim* for what they stated to the Lord Mayor. But according to the case of *Maitland* v. *Goldney*(*b*) an action is maintainable against a person who maliciously repeats slander although he names his author at the time.] Still the question would be, whether it was a malicious publication or made with an improper motive, for if there be no mala fides the defendants are justified. This is a bonâ fide publication of what takes place relating to a matter in which the public is deeply interested, and is it to be said that the public is to be kept in ignorance of matters of so much importance, or the publisher of it to be held liable to an action, because he cannot prove the truth of the

(*a*) 12 Rep. 133. (*b*) 2 East. 426.

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facts, although he relates accurately what he has heard? There is one instance, at least, in which the putting matter injurious to the character of another into writing would not be actionable. Giving an untrue character of a servant is not actionable unless there is express malice; but suppose the same character were reduced into writing would that make any difference? Clearly not. Then, upon the same principle, the matter in question being a faithful report of what Mr. *Prince* and Captain *Antrim* said, is protected. They cited *Knobell* v. *Fuller* (a), *Waithman* v. *Weaver* (b), *Delany* v. *Jones* (c), *Hawkes* v. *Hawkey* (d), *Lewis* v. *Walter* (e).

Denman, C. S. and *R. V. Richards* (with whom was *F. Pollock*), contrà. The jury having found by their verdict that the matters stated in the libel were untrue in point of fact, the question is, whether the defendants are privileged in making those facts public, merely on the ground that they have accurately and fairly related what others have said. Now, upon no principle of law or of common sense can the affirmative of that position be maintained. It cannot be pretended that this is the report of what had taken place in a court of justice, or in the course of a judicial inquiry; and even assuming that it is lawful to make public what takes place before a magistrate in his magisterial capacity, still it does not appear that the Lord Mayor elect, before whom this matter took place, had any jurisdiction to inquire into the subject of complaint. On the contrary, the whole case shews that it was not within his jurisdiction as a magistrate. But independently of this objection, it was merely an ex parte proceeding, and according to the case of *Rex* v. *Fisher* (f) it would have been an unlawful publication, although the matter took place before a magistrate. This, however, must be treated simply as the repetition in print of matter of imputation upon an individual, passing

(a) Peake, N. P. C. 92. (b) 1 Dowl. & Ryl. N. P. C. 10.
(c) 4 Esp. N. P. C. 191 (d) 8 East, 427. (e) 4 B. & A. 605.
(f) 2 Camp. 513.

between private persons. Therefore whether the statement be true or false, as far as the accuracy of the detail is concerned, it affords no defence, even though the defendants, at the time of publication, gave the names of the persons by whom the facts were related. *Maitland* v. *Goldney* is an authority to this point. It is clear that the defendants have not brought themselves within the principle of Lord *Northampton*'s case, assuming that there is no distinction between oral and written slander. In the first place, they do not shew where the authors of the slander are to be found, so as to give the plaintiff a remedy against them, admitting that they would be liable to an action; but in the second, it does not appear that any action would lie against the authors at all for the matter which the defendants have repeated. Before the defendants can bring themselves within Lord *Northampton*'s case, it must be shewn that what Mr. *Prince* and Captain *Antrim* had said would have rendered them liable to an action. But it is perfectly clear, that no action would lie against them for any statement which they had made to the Lord Mayor elect. As far as they are concerned, their representation might be perfectly innocent, and only become culpable when reduced into writing and published in a newspaper. The defendants, therefore, by their act alone have done that which gives the plaintiff a right of action. They have put into a criminal shape, by the act of printing, that which would have been venial in the original authors of the statement. It is perfectly clear, therefore, that Lord *Northampton*'s case does not apply; because, independently of the objection, that that case applies to oral slander only, there is here no sufficient description of the authors of the slander, nor any ground of action against them.

Abbott, C. J.—I am of opinion, that the rule must be made absolute for entering a judgment for the plaintiff, notwithstanding the finding of the jury for the defendants upon the third plea. Our judgment in this case is founded upon

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the matter which appears upon the record, and upon that only. On looking at the record, it certainly does not appear that the libel which has been made the subject of this action, gives an account of any thing taking place before a magistrate in his character of magistrate. We have, therefore, no occasion in this instance to give any opinion as to what may be the right of any person to print and publish that which occurs before a magistrate, acting officially as such. All that appears on this record as the subject of allegation on the part of the plaintiff is, that an application was made to the Lord Mayor elect of the city of *London*, by certain persons, relative to the disposal of some orphan children; but the matter of the libel which is afterwards set forth, goes very far beyond that which could be properly consistent with an application made to the Lord Mayor in his character of a Magistrate. We are then to consider whether the other ground on which this case has been put for the defendants can be supported; and that other ground must now be taken to be this, that they have given a true, fair, and correct report of matter which occurred before a person, not sitting for the purpose of discharging the functions of a magistrate, but as if it was related to him in conversation, or at a dinner, or on any other occasion of public or private festivity. It has been said on behalf of the defendants, that inasmuch as the editor of a newspaper does not himself profess to vouch for the facts which he states, but merely relates what he has heard others say, and at the same time communicates the names of the authors of the matter which is charged to be libellous, he is protected, according to the rule laid down in Lord *Northampton*'s case. It is, however, to be observed, that that was the case of slanderous words, and slanderous words only. We are not called upon to give our opinion upon the distinction between oral and written slander; but there certainly may be a difference between putting into writing, and printing, that which is asserted by another person, and re-

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peating it by parol. The mischief of printed slander is greater, because much more extensive in its circulation, than any spoken slander can be, which from its nature must be confined to a very small circle. But, as I have already said, I do not think we are called upon to decide this case upon that ground, because, adopting Lord *Northampton's* case in its fullest extent, this case will fall short of the doctrine there laid down. In the first place, a part of the matter which is here published, is in its nature such, that if it had been spoken only, no action could be maintained upon it. That an action may be maintained for matters, written or printed, which would not be maintainable if the same matter was only spoken, is a proposition so clearly established by several cases, that I need hardly dwell upon it. The part of the libel to which I first allude as distinguishing this case from Lord *Northampton's*, is that where it is said, "The poor creatures had been led by *M'Gregor* to expect a land where they would live in the greatest plenty, where every thing was flourishing, and but little labour would be required. It was mentioned to them as a mark of the improvement of the place, that a fine theatre had been established, and other establishments formed, indicative, not merely of civilization and comfort, but of luxury. *M'Gregor* learned the property which the settlers had with them, and telling them that *Scotch* money would not pass at the settlement, persuaded them to give it all up to him, and take his drafts for the amount upon his bankers at *Poyais*. The savings were all given up to him; and it is perhaps unnecessary to add, that the settlers, on their arrival at the houseless wilds of *Poyais*, found that no such thing as a banking house was in existence." Now if this had been spoken, no action would have been maintainable for it without an allegation of special damage, or an allegation of something further than appears on this record. If the plea, therefore, be bad in part, it is, according to the rule of pleading, bad altogether. There is also another part of this case which falls far short of the doctrine of

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Lord *Northampton*'s case. What is there said is this: "If *I. S.* publish that he had heard *J. N.* say, that *J. G.* was a traitor or thief, in an action on the case, if the truth be so, he may justify. But if *I. S.* publish that he hath heard generally, without a certain author, that *J. G.* was a traitor or thief, there an action on the case lieth against *I. S.* for this, that he hath not given to the party aggrieved any cause of action against any, but against himself, who published the words." Now if *I. S.* according to the first proposition, publish what he has heard, in order to protect himself he must not only give the name of the person who is his author, but he must also hold himself forth as the witness to prove that that person has said so and so concerning *J. G.* Whereas in the present case, the editor or publishers of this newspaper do not assert that Mr. *Prince* or Captain *Antrim* spoke the matter in question, nor do they offer themselves as the witnesses of the truth that they heard them say so. The instance put in Lord *Northampton*'s case, is that of a person saying that he heard another, by name, say so and so; which, as I before observed, is not merely giving the name of a person against whom an action may be brought, but is holding himself forth as the witness to prove that he so uttered the words. That is not done here, and therefore, without adverting to the other part of this libel, or to any collateral doctrines that have been discussed, I am of opinion, that it is no ground of defence, that the defendants have correctly reported what actually took place in the presence of the magistrate; first, because the Lord Mayor was not then acting in a matter of which he had any cognizance; and second, that the defendants have not protected themselves by giving the names of the persons by whom the slander was originally uttered.

BAYLEY, J.—There is a great distinction between an action for words, and an action for a libel. Written slander will be actionable though the same words would not be so if they were merely spoken. This distinction is well pointed

out by *Mansfield*, C. J. in *Thorley* v. *Kerry*(a), where that learned judge observes, "that though the words of themselves may not impute any punishable crime, yet if they contain that sort of imputation, which is calculated to vilify a man, and bring him, as the books say, into hatred, contempt, and ridicule, an action will lie, if they are reduced to writing," and that learned judge added, as his own opinion, that upon principle he could not make any difference between words written and words spoken as to the right which arises on them of bringing an action. However, the distinction I have alluded to, was there solemnly adjudged. In this case the libel which is the subject of the action, is manifestly calculated to bring the plaintiff into great hatred and contempt, because it imputes to him, that he had sent these emigrants to a distant land in a perfect state of starvation, and this imputation, being reduced into writing, is actionable. The other part of the charge represented to have been made by Captain *Antrim*, being also in print, is equally actionable, and I doubt very much whether it would be actionable if it were verbal slander only. I am clear that it would not, unless it imported that the poor persons alluded to, had been defrauded by the plaintiff of their money by receiving it in *this kingdom*, because the imputation upon the plaintiff is, that he had obtained money from the emigrants upon a representation that it would be repaid to them by his bankers at *Poyais*. Whether such an imputation comes within the scope of 30 *Geo.* 2. c. 24. as the case of a person obtaining money by false pretences, it is not necessary to inquire, because the libel does not represent that he obtained the money from them in this kingdom, and if he did not, it would not be a case within that statute. This, therefore, is to be considered as a case of written slander which becomes actionable, when the same thing if orally repeated would not. Then, as written slander entitles the plaintiff to an action against somebody, against whom can he main-

(a) 4 Taunt. 464.

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tain the action, unless it is against the defendants by whose act the verbal slander is reduced to writing. If he has no remedy against the defendants, he has no remedy whatever against the original authors. According to the principle laid down in Lord *Northampton*'s case, a party repeating slander may be excused, if he gives up the author at the time he publishes the slander, and if he pledges himself to be a witness. Why is he so excused? Because he gives an action against the original author of the words. This is the reason assigned by the different judges in *Davis* v. *Lewis*(a), and *Maitland* v. *Goldney*(b). Now in this case, if the action does not lie against the defendants, against whom will it lie? Certainly not against Mr. *Prince* or Captain *Antrim*, because they only said orally that which is charged against the plaintiff. They have published nothing in writing, and it is not enough for the defendants to say, that they were the original publishers of the slander, because they have only uttered it in a shape in which it is not actionable. Therefore, inasmuch as no action lies against the parties who have merely said orally, what the defendants have republished in writing, the defendants are not exempt from liability. I am of opinion that as there are no other persons against whom the plaintiff can maintain an action but the defendants, the judgment must be entered for the plaintiff, notwithstanding the verdict found by the jury in favor of the defendants on the plea, which states this to be a true and correct account of what passed before the Lord Mayor.

HOLROYD, J.—I am also of opinion that judgment must be entered for the plaintiff on the issue which the jury have found for the defendants, inasmuch as it does not afford a sufficient answer to the action. I think that the plaintiff has shewn a sufficient cause of action, because the libel is only stated to be of and concerning him, and does not state it to be a libel of and concerning the previous matter stated in the introductory part of the declaration. The declaration states that the defendants, maliciously intending to bring the

(a) 7 T. R. 17. (b) 2 East. 426.

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plaintiff into odium and disgrace, and to cause it to be believed that he had wilfully made use of false representations to induce the said emigrants to go to *Poyais*, and to cause it to be believed that he had defrauded the said emigrants of money, published this, which is charged to be a libel of and concerning the plaintiff. The declaration goes on with certain inuendoes; but without those inuendoes, it appears to me, that this would be libellous. The second count also alleges a malicious intent to injure the plaintiff in his character. The defendants by their second and third pleas state that the libellous statement contains a true, fair, and correct account of what passed before the Lord Mayor elect. It does not appear, however, that what passed before the Lord Mayor elect was in the nature of a judicial or magisterial proceeding, nor is it even stated that the Lord Mayor elect was acting in the character of a magistrate. The jury, it is true, have found that the statement was a true and correct account of what passed before the Lord Mayor elect, but they have also found for the plaintiffs, on those pleas which put in issue the truth of the facts so stated. Then the question is, whether they who maliciously and from the motives stated in the declaration, (and which are not justified,) and of which they are found guilty, can be protected from liability, by pleading that they have given a correct account of what they had heard said by others. I think the finding of the jury upon that plea is not a sufficient answer to the present motion, and that we are bound, in point of law, to enter a verdict for the plaintiff notwithstanding their finding. These pleas do not give any ground of action against any other person. They do not give the plaintiff any proof whereby he could proceed against the original author of the slander, nor indeed do they state who heard the words uttered, so as to enable the plaintiff to establish his action against any other person. Indeed, as to the most injurious part of the libel, no action could be maintained by the plaintiff against the original speakers of the slander, unless special damage could be proved. If, in-

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deed, those persons had themselves caused the matter to be published, they might be liable to an action for what they stated before the Lord Mayor, but no action will lie against them for what they said by parol. Unless the plaintiff has his remedy against these defendants, he will have no remedy whatever. But supposing that this came within the principle of Lord *Northampton's* case, still the defendants have not brought themselves within its protection. This libellous statement, in the first place, does not give the plaintiff the means of proving what really passed before the Lord Mayor. It does not profess to state a verbatim account of what passed, but merely that ' Mr. *Prince* observed that the captain, in consequence of his charity, &c.," and that " Captain *Antrim* mentioned a charge which the poor creatures had preferred to him against *M'Gregor*," &c. The defendants do not affect to give the words used by these individuals, but merely state the substance of the charge. Giving the names of the authors at the time the slander is published is no protection to the defendants, according to the case of *Maitland* v. *Goldney*, for if the words be repeated maliciously, giving the names of the authors as a mere pretence for repeating the slander, will be no defence. Here the jury have found upon the other pleas that the libel was published maliciously, and, therefore, the fact of the defendants having given up the names of the authors will be no defence. I therefore think that the judgment must be entered non obstante veredicto upon the third plea, with one shilling damages.

LITTLEDALE, J.—I am also of the same opinion. It must be taken from the allegation in this declaration that the Lord Mayor elect had no legal authority or jurisdiction to inquire into the matter brought before him by Mr. *Prince* and Captain *Antrim*; and that the matter of complaint did not fall within his cognizance, as a magistrate. I consider the complaints of those persons, as they are stated on this record, exactly in the same light as if they were

made to a private individual, in a private room, and therefore we are relieved from the consideration of the question how far a person may be justified in reporting in a newspaper what takes place before a magistrate having legal authority to issue a warrant. Then the question is whether if a person has heard in some private company certain persons say something that reflects upon the character of an individual, he may put it into writing and print it, provided he gives the names of the authors of the slander. Now the only authority for saying that that can be done is Lord *Northampton*'s case. There is, however, a dictum to the same effect in 1 Roll. Abr. 64. With regard to Lord *Northampton*'s case we are not called upon to say any thing; but I cannot help observing, that if the law there laid down, were now to be considered for the first time, I think it would receive some restraints, and I certainly should pause before I adopted a proposition of such extensive latitude. This case, however, differs materially from that. The reason given for the decision in that case is this, that if a person says he has been told by such an one, naming him, that he said so and so, reflecting upon the character of another, he would not be liable to an action, if he gives up the author, and enables the person slandered to bring an action against the author. But in this case, the plaintiff cannot have an action against the original relators of the slander, because in the shape in which they utter it, it is not actionable. It is true that Mr. *Prince* and Captain *Antrim* are the authors of a great deal of slanderous matter upon the plaintiff, but still being oral slander it cannot be the subject of an action. What is charged against him is not imputed as a crime or other offence, nor is there any part of it, unless the plaintiff could allege special damage, upon which an action would lie; and therefore giving them up as the authors would not place the plaintiff in a better situation. Suppose an action would lie against those persons, what means has he of proving the words? The defendants have not given him the means, nor does it appear that they themselves are compe-

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tent as witnesses to prove that they were spoken. The meaning of the rule in Lord *Northampton*'s case is, that the person who repeats the slander, must not only say who the person was who originally published it, but he must be the witness to prove it. Therefore upon that ground also, this case differs from Lord *Northampton*'s, and the defendants' pleas being bad in point of law, the plaintiff is entitled to have judgment entered for him notwithstanding the verdict.

Rule absolute.

THORN and others *v.* HUTCHINSON and another, Bail of J. HUTCHINSON.

Wednesday, June 30.

The Court entered an exoneretur on the bail-piece after execution against the bail, where the defendant in the original action was rendered in due time, but no notice of the render had been given until the goods of the bail had been taken in execution.

ARCHBOLD shewed cause against a rule obtained on a former day, for setting aside the execution against the defendants, and entering an exoneretur on the bail-piece, under the following circumstances: The defendant, *J. Hutchinson*, was arrested in *April*, 1823, for the sum of 194*l.* 17*s.* and gave bail to the action, which proceeded to judgment, and judgment was signed on the 11th *June*. A writ of capias ad satisfaciendum was issued against the defendant on the 30th *March*, 1824, to which the Sheriff returned non est inventus. In *Easter* Term writs of scire facias and alias scire facias were respectively lodged with the Sheriff of *Middlesex* against the bail, to which the Sheriff made his return, and on the 28th *May* a writ of fieri facias was issued into the county of *Surrey*, under which the goods of *R. Hutchinson* were seized in execution. On the 30th *May* the attorney for the defendants gave notice to the plaintiffs' attorney that the defendant, in the original action, had been rendered in discharge of his bail on the 17th *April*, which was the second day of *Easter* Term. Under these circumstances, the question was, whether *J. Hutchinson*, the defendant in the original action, was rendered in sufficient time to discharge his bail. It was contended that the render was a nullity altogether, inasmuch as no notice of it had been

given before proceedings were had against the bail. This was a regular execution, and notice of the render not having been given until after it was executed, this application came too late.

Crowder, contrà, was stopped by the Court.

Abbott, C. J.—We think that the defendant in the original action was rendered in sufficient time to exonerate the bail, but inasmuch as no notice of the render was given until after the proceedings against the bail were taken, we are of opinion that the rule for entering an exoneretur on the bail-piece, can only be made absolute on payment of the costs which have been since incurred.

Rule absolute on payment of costs (*a*).

(*a*) *Littledale*, J., was absent.

Hunter v. Simpson and another.

Wednesday, June 30.

By the practice of this Court a defendant served with a copy of non-bailable process by original, has eight days from the quarto die post or appearance day of the return of the process, to enter an appearance.

ARCHBOLD, on a former day, obtained a rule calling upon the defendants' attornies to shew cause why they should not enter an appearance for the defendants pursuant to their undertaking. On the 12th *June* a special capias was sued out against the defendants, returnable "on the morrow of the *Holy Trinity*." The defendants' attornies having previously desired that process should be sent to them, the plaintiff's attorney waited upon and left with them on the 14th *June* a copy of the writ for each of the defendants, whereupon the defendants' attornies wrote upon the back of the process the following undertaking,—"*H.* and *S.* undertake to appear for the defendants in this action in due time. 14th *June*." This rule having been obtained on the 23d *June*, the question for the opinion of the Court was, whether

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the application was not made too early, according to the practice of the Court.

Chitty shewed cause, and contended that the present rule was moved for too early, for by the practice of this Court in non-bailable process, by original, the appearance need only be entered within eight days after the appearance day, or quarto die post of the return of the process. This practice was so laid down by Mr. *Tidd* (a). Now here, the process being returnable on the morrow of the *Holy Trinity*, [14th *June*] the defendants were not bound to enter an appearance until the 26th *June*, which would be within eight days after the quarto die post, or appearance day of the return of the process.

Archbold, in support of the rule. This question depends upon the construction of the acts of parliament relative to the entering of a common appearance, and not upon any rule of practice which may have obtained without reference to the language used by the legislature. Undoubtedly the books state the practice in this Court to be as stated on the other side, but the books of practice are erroneous upon this point. The practice as to the service of non-bailable process is a matter occurring so seldom, that possibly the error now pointed out may have crept into the filacer's office, and no notice taken of it. Now, by the 12 *Geo.* 1. c. 29. s. 1., which first gave the common appearance, it was enacted that it should be entered "at the *return* of the process or within four days after such *return*," and the same expression is adopted in the 5 *Geo.* 2. c. 27. s. 1. for "the defendant shall appear at the *return*, or within eight days after such *return*." The time, therefore, allowed for entering the appearance, according to this latter statute, is eight days from the *return*, and not from the day of *appearance*. The books of practice, therefore, are erroneous in laying it

(a) Tidd, 8th ed. 240. Imp. K. B. 9th ed. 618. *2 Chit. Rep. 35. 1 Arch. P. 299, 300.

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down that the appearance is to be entered within eight days after the quarto die post of the return of the process. The day usually called the quarto die post is given at common law, by favor of the Court, and not by the statute. The present point is to be determined by the language of the act of parliament, which speaks of the *return* of the writ, and does not mention the quarto die post. The Court of Common Pleas has acted conformably to the words of the statute, and has ruled that the eight days shall be reckoned from the *return* day, and not from the quarto die post of the return of the process (*a*), and therefore, unless the practice which has obtained in this Court be inflexible, the Court will come back to the true construction of the statute.

ABBOTT, C. J.—Still this is a question of construction, and we must determine what is the meaning of the words of the statute—" return of the process." The Common Pleas has construed them to mean the very day. It seems, however, that this Court has construed them to mean the quarto die post or the appearance day. Which of the two constructions is the correct one, may be matter of doubt. It is certainly desirable that the practice of both Courts should be made uniform, but it is impossible to say that the attornies in this case have done wrong in conforming to that which has been hitherto considered the rule of practice in this Court. Whether we shall hereafter think fit to promulgate a new rule of practice upon the subject, is another matter. The question is, whether, by the practice of this Court, the plaintiff has not moved too soon, and we think he has, and therefore the rule must be discharged, but without costs.

Rule discharged without costs.

(*a*) Tidd, 8th ed. 241. Imp. C. P. 216. 17 Pr. Reg. 32 Barnes. 245, 6.

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ASPINALL *v.* STAMP and Another, Assignees of SHAW, a Bankrupt.

By a Judge's order the defendant was allowed to go to trial upon payment of a certain sum of money, together with the costs of the cause up to the date of the order; and the defendant having recovered a verdict without previously complying with the terms of the order: Held, that the costs taxed in his favour on the postea could not be set off against the interlocutory costs, so as to deprive the plaintiff's attorney of his lien.

PARKE moved for a rule to shew cause why the defendants should not be at liberty to deduct the sum of 46*l*. 13*s*. amount of plaintiff's taxed costs upon interlocutory proceedings in this cause, from a sum of 132*l*. 10*s*. amount of taxed costs due to defendants upon the result of the trial of the cause. The facts disclosed on affidavits were these. It was an action of trespass for seizing certain goods and chattels claimed as the property of the plaintiff, and the venue was laid in *Yorkshire*. The defendants justified the trespass under the statutes concerning bankrupts, as assignees of *Shaw* the bankrupt. After the issue was made up, and notice of trial given, the defendants, having some doubt whether all the goods in question belonged to their bankrupt, applied to the Lord Chief Justice at chambers, who, under the circumstances then disclosed, made his special order, whereby he directed that, upon payment of the sum of 20*l*. together with the costs of the cause up to the date of the order, the defendants should be entitled to a verdict in their favour, unless the plaintiff should at the trial prove, that the value of the goods, mentioned on the back of the order, exceeded the sum of twenty pounds, or should prove a trespass as to entering the dwelling-house, or taking some of the other goods enumerated in the declaration. On the 19th *March* last, this order was served on the plaintiff's attorney, who resided at *Hull*, the commission day at *York* being the 20th of *March*, and the cause being set down in the first division. On the same day the order was served, the defendants' attorney tendered the sum of twenty pounds to the plaintiff's attorney, and at the same time told him, that the costs not having been taxed, he did not know the amount, but promised that as soon as they were ascertained they should be paid. The plaintiff's at-

torney made no objection. At the trial of the cause the plaintiff, being unable to give the evidence required to be given by the order above mentioned, a verdict was entered for the defendants. The amount of the interlocutory costs, up to the time of the order, was taxed on the 17th *May* at 46*l.* 13*s.* and the defendants' costs were taxed on the postea at 132*l.* 10*s.* and the question was now, whether the defendants were at liberty to deduct the former sum from the latter, regard being had to the nature and terms of the Lord Chief Justice's order.

E. Alderson shewed cause in the first instance, and contended that if this rule were made absolute, it would prejudice the plaintiff's attorney, by depriving him of his lien upon the 46*l.* 13*s.* for costs, due to him from his client. It was sworn that the attorney had a greater demand against his client than the amount of these interlocutory costs, and the court would not allow the attorney to be a sufferer in consequence of the laches of the defendants, in not paying the costs pursuant to the Lord Chief Justice's order before the cause went to trial. The payment of those costs was a condition precedent, and therefore the defendants were not now at liberty to deduct those costs from the taxed costs upon the postea. The Judge's order gave the defendants an advantage which they would not otherwise have been entitled to, and the payment of 20*l.* and the costs of the cause up to the date of the order were the terms on which the advantage was given.

Parke, in support of the rule, contended that the plaintiff's attorney having waived the advantage of the order, by not stipulating to have the interlocutory costs paid before the trial of the cause, his resistance to the present application was now too late. It was competent to him to insist upon having the costs paid before the cause was tried, if the payment of those costs was a condition precedent. But

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the case of *Howell* v. *Harding* (a) is an express authority in support of the present application. There it was held that the plaintiff is entitled to set off interlocutory costs in the same cause, payable by him to the defendant, against the debt and costs recovered by him on the final result of the cause, notwithstanding the objection of the defendant's attorney on the ground of his lien, which only attaches on the general result of the costs of the cause.

ABBOTT, C. J.—This case is distinguished from that, because here there is a special order, that *upon* payment of the sum of 20*l.* together with the costs of the cause up to the date of the order, the defendants should be entitled to a verdict in their favour unless, &c. We therefore think that the payment of the 46*l.* 13*s.* was a condition precedent.

BAYLEY, J.—The defendants were liable to pay under my Lord Chief Justice's order 46*l.* 13*s.* but they now apply to be relieved from paying that sum, because they are entitled to receive from the plaintiff the sum of 132*l.* 10*s.* Upon which the plaintiff's attorney says, that if the court sanctions that proposition, he will be deprived of his lien against his client. I think that is a very reasonable objection, for if we were to make this rule absolute, the plaintiff's attorney would be a sufferer.

HOLROYD, J.—It is clear that at the trial the defendants could not set off the 46*l.* against the 132*l.* and I do not see why they should be at liberty to do so now.

Rule discharged (b).

(a) 6 East, 326. (b) *Littledale*, J. was absent.



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MOULD v. ROBERTS.

Wednesday, June 30.

An attorney is liable to an attachment for not entering an appearance for a defendant, in pursuance of his undertaking.

ON shewing cause against a rule nisi for an attachment against the defendant's attorney, for not entering a common appearance for the defendant pursuant to his undertaking, the question was, whether the attorney was liable to an attachment for such default.

Campbell contended that this was not a case in which an attachment would lie; but he produced an affidavit from the defendant's attorney, stating that the plaintiff's attorney had agreed not to enforce the undertaking.

Chitty, contrà, referred to *Tidd*, 242. 8th *Ed.* where it is laid down, that "the usual mode of proceeding against an attorney for not filing common bail or entering an appearance, pursuant to his undertaking, is by attachment (*a*); and if an attorney undertake to appear, the Courts will oblige him to do it in a proper manner; therefore if he undertakes for an infant, he must appear by guardian (*b*); and though he may have been imposed upon by the sheriff's officer, yet they will oblige him to fulfil his undertaking (*c*)."

The COURT said, there was no doubt that an attorney is liable to an attachment for not entering an appearance pursuant to his undertaking; but inasmuch as in this case it was sworn on the other side, that the plaintiff's attorney had agreed not to enforce the undertaking, the rule must be discharged, but without costs.

Rule discharged without costs.

(*a*) 6 Mod. 42. 86. (*b*) 1 Stra. 114. 445.
(*c*) 1 Stra. 693. 1 Chit. Rep. 129 (*a*).

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Thursday, July 1.

Monition does not lie for recovering a curate's salary, assigned to him by the Bishop, without the consent of a rector who *resides* on his benefice, and is capable of discharging his duties generally, but wants the assistance of a curate.

The KING *v.* The Bishop of PETERBOROUGH.

IN *Trinity* Term last, a rule was obtained calling upon the Lord Bishop of *Peterborough* to shew cause why a writ of prohibition should not issue, to prohibit him from proceeding to issue a sequestration upon a monition issued by him against the Rev. *Charler Wetherell*, clerk, at the instance of the Rev. *Samuel Stanley Paris*, clerk, for the recovery of his salary. The question raised for the opinion of the Court was, whether, under the statute, 57 *Geo.* 3. c. 99. a curate could proceed by monition for a salary assigned to him by the Bishop without the consent of the rector, who was resident on his benefice, and capable of performing his duties generally, but requiring the assistance of a curate.

In *Michaelmas* Term, *Littledale*, and at the Sittings under the King's warrant after *Easter* Term, *E. Alderson* and *C. E. Law*, were respectively heard against the rule; and *Denman*, C. S. and *Twiss*, were heard in support of it. The Court took time to consider the case, and the judgment (which embraces all that it is material to state in the report of the case) was now delivered by

ABBOTT, C. J.—This was an application for a writ of prohibition to stay proceedings on a monition issued by the Bishop to the Rev. *Chárles Wetherell*, incumbent of the rectory of *Byfield*, in the county of *Northampton*, for the payment of salary to his curate, the Rev. *Samuel Stanley Paris*. This case was very elaborately argued before us upon the construction of the 57 *Geo.* 3. c. 99. and the prior acts upon this subject. The facts upon which the question has arisen are shortly these: Mr. *Wetherell*, being generally resident on his benefice, and generally discharging the duty of his parish, was desirous of having some assistance, and particularly with reference to a school which

had been established by himself, and with a view to occasional absence, engaged Mr. *Paris* to become his curate, at the yearly stipend of 100*l.*; with power to either party to put an end to the contract on three months' notice; and having so done, applied to the Bishop of *Peterborough* to license Mr. *Paris*. The Bishop approved of the person nominated, but thought he could not, under the statute, allow a less salary than 120*l.* a year; and he communicated this to Mr. *Wetherell*, who remonstrated against the salary, and insisted that the Bishop might allow less than 120*l.* A license, however, issued, fixing the salary at 120*l.*; but Mr. *Wetherell* alleges, that Mr. *Paris* declared to him that he should not demand more than 100*l.* This fact, however, does not appear to have been communicated to the Bishop; and if the salary of 120*l.* was well assigned, an agreement to receive less would be void under the statute. Differences arose between Mr. *Wetherell* and the curate, who refused to quit the curacy, and then claimed a salary at the rate of 120*l.* a year. The curate then applied to the Bishop, who, at his instance, issued a monition for payment of the curate's salary, but without specifying the amount. Soon after this, Mr. *Wetherell* received from the churchwardens the copy of a license similar to the original one, but having a memorandum stating that the 120*l.* was assigned by mistake, and that the Bishop therefore reduced it to 100*l.*, the stipend assigned on the nomination. Mr. *Wetherell* then applied to this Court for a prohibition. The alteration of the salary thus made comes too late to give to the case the character of a curate, licensed at the nomination and request of an incumbent, with an assignment of salary, by the consent of the incumbent. The question then is, whether the curate can proceed by monition for the recovery of a salary assigned by the Bishop, without the consent of the incumbent, the incumbent being resident on his benefice, and discharging the duties of it generally, but being desirous of the assistance of a curate. The proceeding by monition is not consistent with the general course of the ecclesiastical law

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in cases of a curate's claim to salary, and can only be resorted to where it is given by statute; and it has been argued against the prohibition, and in support of the proceeding, that this mode of proceeding is given generally for the recovery of a curate's salary by sect. 53 of 57 *Geo.* 3. c. 99. By that section it is enacted, "That it shall be lawful for the Bishop, and he is hereby required, [subject to the several provisions and restrictions contained in the act,] to appoint to every curate such salary as is allowed and specified in the act; and every license to be granted to a stipendiary curate under the act, shall contain and specify the amount of the salary allowed by the Bishop to the curate; and in case any difference shall arise between any rector, &c. and his curate, touching such stipend or allowance, or the payment thereof, or the arrears thereof, the Bishop, on complaint to him made, may and shall summarily hear and determine the same; and in case of wilful neglect or refusal to pay such stipend, salary, or allowance, or the arrears thereof, he is empowered to proceed by sequestration or monition." We think this section relates only to licenses granted and salaries assigned, in some way, in conformity to the act; and therefore we are to inquire whether the salary in question has been so assigned. It has been assigned to the curate of a resident incumbent, and to an amount to which the incumbent did not consent; and this proceeding by monition cannot be within the act to which I have adverted, unless in every case of a resident incumbent desirous of the assistance of a licensed curate, the Bishop has authority to assign a salary of greater amount than the incumbent is willing to pay. Having carefully reviewed the provisions of this act, and of the several statutes that have preceded it, we are of opinion, that the Bishop has not such a power. The authority of the Bishop to refuse such a license, if he considers the curate's stipend to be inadequate, is very distinct from an authority to increase the proposed stipend according to his discretion, limited only by a reference to the statutable allowances in other cases. Upon the argu-

ment at the bar, reference was made to the preceding statutes upon the same subject; and the first is, the 12 *Anne*, st. 2. c. 12. This gives a summary remedy to the curate for his stipend. But this statute is evidently confined to a curate nominated by a rector or vicar to the Bishop, to serve the cure in the absence of the rector or vicar. The maximum of the stipend to be appointed by the Bishop under this act is 50*l.* a year. The next statute upon the subject is the 36 *Geo.* 3. c. 83. This begins by reciting at length the provisions of the 12 *Anne*; and it further recites, that in many cases the provision made by that statute for the maintenance of the curate is insufficient, and it then proceeds to enact, by section 1. "That it shall be lawful for the Bishop to appoint any stipend or allowance for any curate theretofore nominated or employed, or thereafter to be nominated or employed, not exceeding 75*l.* a year, over and besides, on livings where the rector or vicar does not personally reside for four months in the year at least, the use of the house, or under certain circumstances an additional stipend of 15*l.* in lieu thereof." The words of this section are "any curate;" but upon connecting the enactments with the preamble, and with the subsequent provision as to the use of the house, this enactment appears to be confined in its operation to the curates of *non-resident* incumbents. It, however, not only increases the stipend, but gives the authority in the case of the curate employed, as well as of a curate nominated, by the incumbent, whereas the 12 *Anne* mentions only *curates nominated*. The only other section of the statute on this subject is the 6th, which, after reciting "that it would be expedient that the authority of ordinaries to license curates, and to remove licensed curates, should be farther explained, enlarged, and confirmed," enacts, "That it should be lawful for the ordinary to license any curate who is, or shall be, actually employed by an incumbent, although no express nomination of such curate be made to the ordinary by the incumbent; and that the ordinary may summarily revoke any license granted to any

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curate, and remove him, on reasonable cause, subject to an appeal, as well in the case of a license to a curate not nominated, as in the revocation of a license granted to a curate." Construing this section of the statute with reference to the first section, which, as before observed, has introduced the word "employed," it appears that this section also respects only the curates of *non-resident* incumbents; and even if it extends to others, it contains nothing as to the allowance of stipend. The next statute is the 53 *Geo.* 3. c. 149. This begins by reciting the titles (but not the enactments) of the two preceding statutes, one of the canons of 1603, (which contains nothing as to the assignment of stipend to a curate), and the insufficiency of the provisions of those statutes and canon, and of the laws in force respecting curates, and the necessity of making more effectual provisions to secure a competent maintenance to curates in order to ensure the due performance of the service of the church, in parishes where the incumbents *do not reside.* It then enacts "that an incumbent not duly residing (unless he shall do the duty of the church, having an exemption from or license for non-residence,) and who shall for six months after the passing of the act, or after his appointment, or after the death or removal of a former curate, neglect to nominate a curate to be licensed by the Bishop, to serve his church, or who shall for three months after the death or resignation of any curate, who has served his church, neglect to notify the death or resignation, to the Bishop, shall forfeit all benefit of dispensation, or exemption from residence or license for non-residence; and in every case in which no curate shall be nominated to the Bishop, for the purpose of being licensed, within such period as aforesaid, the Bishop may appoint and license a proper curate with such salary as is by this act allowed and directed, to serve the church of the place, in respect of which such neglect or default shall have occurred." This first section, then, plainly relates only to curates licensed for *non-resident* incumbents. The second section of this act, from which

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the 53d section of the 57 *Geo.* 3. c. 99. is admitted to have been taken, enacts "that it shall and may be lawful for the bishop, subject to the several provisions thereinafter contained, to appoint to every curate, so licensed, such sufficient salary as is allowed and specified in this act, and that the license to be granted as aforesaid, shall specify the amount of the salary to be allowed," and it proceeds to give a summary remedy in cases of difference between the curate and the incumbent, and for the recovery of arrears of the stipend. This section is made in addition to the first, and plainly refers to it, by the words "so licensed," and therefore, cannot be applied to any cases except those mentioned in the first section, unless by some subsequent part of the act it shall distinctly appear to be extended to such cases. The 3d, 4th, and 5th sections, certainly contain no such extension, because they exclusively relate to the parsonage-house, and its enjoyment by the curate. The sixth section relates only to the registering of the grant, and revocation of those licenses granted under the act. The seventh section gives a scale of salary according to the population of the parish; but never exceeding the value of the living, nor 150*l.*, to be appointed to a curate licensed to serve the benefice of an incumbent, appointed after passing the act, who shall not duly *reside* (unless he shall do the duty of the church having an exemption from or license for non-residence) in the absence of such non-resident incumbents. According to the scale thus given, the salary may in many cases amount to the whole value of the benefice, and therefore, the eighth section enacts "that in such cases the salary shall be subject to the legal charges on the benefice." The ninth section relates to the case of an incumbent of one parish serving the cure of one or two adjoining parishes, and in those cases the salary is regulated by a diminution from the salary which, in the several cases before mentioned, the bishop is required to appoint; the cases before mentioned being those of *non-resident* incumbents

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only; and therefore, this section can only apply to cases of that description. The 10th section introduces, for the first time, the case of an incumbent who may be resident, but this is done incidentally rather than directly, for it provides and "enacts, that in case it shall be made appear to the satisfaction of the bishop, that the incumbent of a benefice is, or has become non-resident, or incapable of performing the duties thereof, from age, sickness, or other unavoidable cause, and that, from those or other special circumstances, great hardship would arise if the full amount of the salary specified in the act should be allowed to the curate, the bishop may assign to the curate a salary less than such full amount." This provision is very suitable to the case of *non resident* incumbents, for whose curates the act had previously fixed the amount of salary, leaving nothing to the discretion of the bishop; but it is wholly unnecessary and inoperative, in the case of *resident* incumbents, disabled from the performance of their duties, because as to their curates no amount of salary had been previously specified. It is obvious that the incapacity of performing the duties must have been introduced into this section by way of caution, and without that strict attention to the other parts of the act, which shew that it was quite unnecessary. The 11th section contains a further provision in relief of the incumbent of a benefice of which the whole profit is to be given to the curate, and obviously relates to the scale given by the 7th section, and consequently to the curate of a *non-resident* incumbent. The 12th section also clearly relates to the scale given by the 7th section, and the occupation of the parsonage-house, under the 1st section, and consequently to the case of a *non-resident* incumbent. The 13th section in the case of a benefice exceeding 400*l.* a year, authorises the assignment of a salary to a curate, being resident in the parish, greater than is allowed by the 7th section, and must consequently be construed with reference to the 7th section, and be referable to such curates only as

are therein described. The 14th section, upon which much stress was laid in argument at the bar, is a restraining and not an enabling clause. It enacts that nothing in the said act contained shall authorise a bishop to assign to a curate, a greater stipend than is allowed by the statutes in force before the passing of this act, unless with the consent of the incumbent, in three several instances, first, to the curate of an incumbent holding his benefice before the passing of the act, and on which he shall be non-resident by license or exemption; secondly, to the curate of an incumbent who shall duly reside on his benefice; thirdly, to the curate of an incumbent of a benefice who shall himself do the duty of the same, having a legal exemption from residence, or a license to reside out of his benefice, or out of the parsonage-house. Now a clause so framed cannot, according to any sound rule of construction, be deemed to give any power to the bishop; neither can any inference be reasonably drawn from of it, that the bishop possessed any prior authority to fix the salary of a curate of a resident incumbent, because in the two other preceding instances, mentioned in this section, this statute had given no power to the bishop which he did not possess before this act passed, as obviously appears upon referring to the 7th and 1st sections of this act. This clause also seems to have been introduced only from more abundant caution, and, like many other clauses of the same description, is introduced where perhaps caution was unnecessary. The 17th section provides for the salary of the curate of an incumbent "having two or more benefices, and residing part of the year on one, and part on another, and employing a curate from time to time, upon such of the same from which he shall be absent during his residence on the other." This is virtually a provision for the curate of a non-resident incumbent. The 18th section relates to the particulars to be stated by an incumbent applying for a license for non-residence, and requires him to state the salary he proposes to give to his

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curate; and the 19th section requires the same particulars to be stated on an application for a curate by an incumbent exempt from residence.

From this view of these several statutes, it is manifest that they do not authorise the bishop to fix the salary of a curate of a *resident* incumbent *without the consent* of such incumbent. All these statutes were repealed by the 57 *Geo.* 3. c. 99. for the purpose of explaining some of their provisions, and of adding others, and they are to be referred to, not as law, but for the purpose only of explaining and construing the act last mentioned. This last act embraces several other subjects, as well as the licensing of curates and assignment of their salaries; and upon an attentive perusal, it appears that almost every clause upon this subject is taken from some clause in one of the former acts, with some variations and improvements, but without any alteration important to the consideration of the present case. The only clause on this subject entirely new is the 50th, which empowers the bishop to appoint a curate with such stipend as therein mentioned, "when it shall be made appear to him, that by reason of the number of churches or chapels belonging to any benefice, or their distance from each other, or the distance of the incumbent's residence from any of them or the negligence of the incumbent, the ecclesiastical duties of the benefice are inadequately performed." The case now before the court is certainly not of this description. Having thus detailed and commented so minutely on the clauses, in former acts, it is wholly unnecessary to refer particularly to the corresponding clauses in the act now in force. It is sufficient to say, that, in the act now under consideration, nothing is to be found which can authorise the Court to consider the present case as falling within the scope of the 53d section. It forms no part of our duty to pronounce any opinion upon the expediency of giving to the ordinary a direct authority to appoint a

salary to the curate of a resident incumbent. We learn from these acts that the legislature has thought it expedient to give to the ordinary a power of fixing a curate's stipend in certain cases, and coupled with certain restrictions. If the power is not given in certain other cases, we ought to infer, that the legislature has not hitherto thought it expedient to give the power. Whether from an apprehension that resident incumbents might be thereby deterred from taking an assistant in the performance of their duties, or for what other reason, it is not our business to inquire. Our judgment on the present case is given with reference to its own peculiar circumstances, namely, *the assignment of a salary to the curate of a resident incumbent greater in amount than the incumbent had proposed or consented to.* In giving our judgment upon this case, therefore, we are not to be understood as giving any opinion upon the general question, as to the effect of a salary assigned to a curate of a resident incumbent, in conformity to his own proposal, nor upon the authority of the bishop to entertain in any case a suit for the curate's salary, in a formal manner, according to the course and usage of the ecclesiastical law; but I cannot abstain from remarking that the power to proceed by monition in any case regarding the stipend of the curate of a resident incumbent is so questionable, that it may be a fit subject for the consideration of the legislature. One of the objects of these statutes appears to be the maintenance and protection of curates. We cannot doubt that the judge against whom this application was made, thought he was acting in pursuance of this object, and discharging his duty according to the provisions of the statute; but we think he has been mistaken in the application of the statute in this particular case. We are therefore of opinion that the rule for a prohibition must be made absolute.

Rule absolute.



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Saturday, July 3.

SHAW *v.* BROOM.

Where the drawer of a bill of exchange indorses it to a third person as a valid security, and whilst it is current, his declaration *afterwards* that it was an accommodation bill, will not defeat the indorsee's right to sue the acceptor.

ASSUMPSIT by the indorsee against the acceptor of a bill of exchange for 100*l.*, drawn by one E. *Clifford.* Plea, non assumpsit. At the trial before *Abbott*, C. J., at the *Middlesex* Sittings after last *Hilary* Term, it appeared that *Clifford*, the drawer of the bill, having been arrested, had applied to the plaintiff to become one of his bail to the sheriff, which he agreed to do upon being indemnified against the consequences. *Clifford* then deposited the bill in question with him, on condition that it was to be returned when the purpose for which it was deposited, was answered. The action against *Clifford* was afterwards settled, and the plaintiff was discharged of his liability as bail. At this time, however, there were accounts between the plaintiff and *Clifford*, the latter being indebted to the former for goods sold, an upon a warrant of attorney, exceeding the amount of the bill. The plaintiff rested his case upon proof of these latter facts. In answer to the plaintiff's case, it was proposed to give in evidence a declaration on the part of *Clifford*, that the bill was merely an accommodation bill, and accepted for him by the defendant without any consideration. A witness accordingly proved, that he had heard *Clifford* say, that the bill had been accepted by the defendant for his accommodation, and without any consideration. It appeared, however, that this declaration was made by him after the bill had been indorsed to the plaintiff and before it was due. This evidence, it was contended on the part of the plaintiff, was inadmissible to affect the plaintiff's title to sue. The learned Judge, however, received it, reserving its admissibility as matter for farther consideration. The defendant, in the distress of the case, then called *Clifford*, who proved that in point of fact the bill had been merely accepted for his accommodation by the defendant, and denied all consi-

deration between him and the plaintiff for the bill. The jury found their verdict for the defendant. A rule nisi for a new trial having been granted in *Easter* Term, on the ground that *Clifford's* declaration was inadmissible in that stage of the cause in which it was received,

Parke and *Abraham* now shewed cause. The declaration of *Clifford*, the drawer, that the bill was accepted by the defendant for his accommodation and without value, was admissible evidence to impeach the plaintiff's title to sue. The plaintiff derives title from the drawer, and therefore what would be an answer to an action at the suit of *Clifford* is equally an answer to the present action. The plaintiff is in effect trustee for the drawer, and must recover, if at all, through the title of the latter. This is analogous to the case of a nominal plaintiff suing upon a policy of insurance, where the declarations of the assured, or party really interested, may be given in evidence to shew that the defendant is not liable. In an action upon a charter party, by the master of a ship for freight, the declarations of the owner, for whose benefit the action is brought, are evidence for the defendant, *Smith* v. *Lyon* (*a*). Upon the same principle the declaration of *Clifford*, the drawer, was admissible, to shew that the plaintiff had no right to sue, and therefore this verdict cannot be disturbed. They referred to a case of *Benson* v. *Marshal* (*b*), tried at *Lancaster*, where the point now contended for was expressly ruled by *Holroyd*, J. There the plaintiff sued as indorsee, against the defendant as acceptor of a bill of exchange. The defendant offered evidence of a declaration by the payee, that he had parted with the bill to the plaintiff without consideration, and it was received. [*Bayley*, J. That would not hurt the payee's title; it only went to impeach the plaintiff's title. The question here is, whether the

(*a*) 3 Campb. 465. See *Rex* v. *Hardwicke*, 11 East, 578.
(*b*) Not reported.

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plaintiff stood in the same situation as *Clifford*, without a better title.]

Scarlett in support of the rule. The declaration of *Clifford*, at the period when it was made, was inadmissible to affect the plaintiff's title. It may have been true, that the bill was originally put into the plaintiff's hands for a special purpose, so as to give him only a qualified title; but still the plaintiff shewed an absolute title to it by proving that there existed a general account between him and *Clifford*, upon which the latter was debtor to him for more than the amount. Had the declaration been made by *Clifford* whilst he held the bill, and after it was due, undoubtedly the plaintiff's title might be affected; but the fact proved was, that it was made after it was indorsed to the plaintiff, and whilst it was current. If a person takes a bill after it is due, undoubtedly he takes it with all the defects in the indorser's title; but here the bill was taken whilst it was current, and the declaration that it was an accommodation bill, was not made till afterwards. Such a declaration in that stage of the transaction was inadmissible, because it is a declaration to affect the title of a person who may or may not have given consideration for it. The case of *Benson* v. *Marshal* was this: A bill of exchange had been given by the acceptor, for the accommodation of the drawer. Whilst it was in the hands of the latter, he had made a declaration that it was an accommodation bill, and that the acceptor had received no value. Long after it was due, the drawer indorsed the bill to the plaintiff, all accounts between the drawer and acceptor being then closed. Upon which it was contended, that the declaration of the drawer was admissible to affect the plaintiff's title, on the ground that what would be a good defence against the drawer, would be equally a good defence against the indorsee, and for that reason, the declation of the drawer was received. But this case is totally different from that. *Clifford* indorses the bill to the plain-

tiff *before* it is due; the plaintiff is the holder of it when it is due, and the declaration is not made until afterwards. The case cited was that of a declaration of the drawer whilst he held the bill, and after it had become due, which is very different from a declaration, after the drawer has parted with the bill. It is clear, therefore, that *Clifford*'s declaration alone was inadmissible to affect the plaintiff's title.

ABBOTT, C. J.—The plaintiff in the outset of the case did not profess to sue in respect of any right or title that *Clifford* had in the bill, because he gave in evidence an account of goods sold and delivered to him to the amount of 24*l*., and also proof of a judgment upon a warrant of attorney, by which it was manifest that *Clifford* was his debtor to a greater amount than that of the bill. That was the plaintiff's original case; and the object was to shew that, as against *Clifford*, he had a good title to the bill. It was proved that *Clifford* had parted with the bill to the plaintiff whilst it was current, and that the declaration, as to its being accommodation paper, was not made until afterwards. The question then is, whether after he has parted with the bill, as a good and valid security, he can, by his own declaration, defeat the title of the person to whom he has so parted with it, or put in jeopardy, or vary the claim of the plaintiff, by saying, that he himself had received it from the acceptor without consideration. According to the case cited (as now explained), it seems that the declaration given in evidence, was that of a man, who, at the time it was made, was holder of the bill, and who had not parted with it until after it was due. In such case, the rule undoubtedly is, that whatever consideration the plaintiff might have given for such a bill, still by law, he could not be in a better situation than the drawer, and must stand or fall by the title of the latter. The facts of this case are, however, entirely different. Upon further consideration, I think I ought not to have received the evidence

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of *Clifford's* declaration, and therefore there must be a new trial.

BAYLEY, J.—I think the defendant had not laid a sufficient foundation to let in evidence of *Clifford's* declaration. If the plaintiff had brought the action as trustee for *Clifford*, and rested solely on the title of the latter, then the declaration of *Clifford* would have been admissible; but here the plaintiff rests upon the strength of his own title as against *Clifford*, and therefore it is not competent to the defendant to give in evidence the declarations of *Clifford* made after he had parted with, and whilst the bill was current. If the plaintiff insisted upon recovering through *Clifford's* title, there are cases in which it has been held that such declarations would be admissible, *Harrison* v. *Vallance* (a).

HOLROYD.—Under the circumstances of this case, I think the evidence was not receivable, the declaration of *Clifford* having been made after he had parted with the bill, and before it was due.

LITTLEDALE, J.—I am of the same opinion.

Rule absolute.

(a) 7 J. B. Moore, 304. 1 Bing. 45. S. C. See *Hart* v. *Horn*, 2 Campb. 92. 10 East, 395; and 7 T. R. 663.

Saturday, July 3.

The KING v. KIDDY.

Where magistrates first took the examination of witnesses, not on oath, in support of a conviction, and afterwards swore them to the truth of their evidence, the Court expressed its disapprobation of the practice.

THIS was a motion for a mandamus to magistrates, to set out the evidence taken by them in support of a conviction on the game trespass act. On shewing cause, one objection taken to the mode of proceeding by the justices was, that they had first taken the examination of the wit-

nesses, in support of the conviction, and then administered the oath to the truth of their statements respectively.

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The COURT observed, that this was a very irregular and improper practice in criminal cases.

ABBOTT, C. J.—Magistrates should understand that the oath is to be administered to the witness before he is examined, and not afterwards.

BAYLEY, J.—The answer of the witness is to be taken under the sanction of an oath. Swearing him after his examination is taken, is a very incorrect mode of proceeding,and it is h oped will be discontinued.

As the matter was afterwards settled, nothing came of the motion for a mandamus.

Adam was for the crown; and *Chitty* for the defence.

The KING *v.* The LICENSING JUSTICES of the WARD of FARRINGDON WITHOUT.

Saturday July 3.

Mandamus refused, to command justices to rehear an application for an ale house license, which they had refused, though it was suggested that their refusal proceeded from a mistaken view of their jurisdiction.

H. COOPER had in *Easter* Term obtained a rule nisi for a mandamus to the licensing Alderman of the ward of *Farringdon Without*, commanding him to hear the application of *A. B.* for a license for *Joe's Coffee House, Fleet Street*, suggesting by affidavit, that the Alderman had refused to hear the application.

Hutchinson now shewed cause on an affidavit that the application had been heard and refused, on the ground that the Alderman had no authority, under the circumstances to grant a license.

Cooper admitted that the application had been heard, but refused under a mistaken view of the statute and

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the object of this motion was to have the application reconsidered upon more mature deliberation.

Per Curiam. It being conceded, that the magistrates have heard and determined upon this application for a license, which is a matter peculiarly for their consideration, we cannot grant a mandamus to them to re-hear what they have already determined.

Rule discharged, but without costs.

Saturday, July 3.

Wilson, Gent. one &c. *v.* Gutteridge.

The Court has authority to refer an attorney's bill for taxation, independently of the statutes 2 *G.* 2. c. 23. & 30 *G.* 2. c. 19. An attorney's bill referred to the Master where one of the items was for drawing a warrant of attorney, which had never been executed.

THIS was an action for an attorney's bill of costs. On a former day a rule nisi was granted for referring the bill to the Master for taxation, and on shewing cause now, the question was, whether certain items in the bill drew after them the rest, so as to render the bill liable to taxation. The items, which it was contended subjected the bill to taxation, were for attending the defendant and drawing a warrant of attorney, which, however, was *never ingrossed or executed.* The other items of the bill were clearly not within the statutes 2 *Geo.* 2. c. 23. s. 23. & 30 *Geo.* 2. c. 19. s. 75.

W. E. Taunton shewed cause. This case does not come within the words or the spirit of the statute, inasmuch as drawing a warrant of attorney which was never executed, cannot be considered as a proceeding "at law or in equity." It must be something done under the authority of the Court, in order to render the items charged taxable. Had the warrant of attorney been ingrossed and executed, there are cases which say that an item in an attorney's bill in that respect, would be sufficient to enable the Court to refer the whole bill for taxation. But no case has gone the length of holding that the mere preparation or drawing of a warrant

of attorney is enough to render the bill taxable and draw after it other items. The case of *Burton* v. *Chatterton*(a), in which all the authorities upon this subject were reviewed, seems to be decisive. There it was held that a charge for preparing an affidavit of the petitioning creditor's debt and bond to the chancellor, in order to obtain a commission of bankruptcy is not a taxable item in an attorney's bill within 2 *Geo.* 2. c. 23. s. 23. as being a charge at law or in equity, the affidavit not having been sworn, nor a commission issued. It is difficult to distinguish that case from this, regard being had to the words of the statutes, by which alone the point is to be decided.

Brodrick, contrà. Independently of the statutes referred to, which apply only to particular cases, and to bills of a particular description, the Court has a right at common law to direct the taxation of other bills of costs. *Anonymous*(b). Such is the constant practice. Therefore, whether the drawing a warrant of attorney which has never been executed, can or cannot be considered as a proceeding at law or equity, within the words of the statute, makes no difference as to the control of the Court over the bills of its own officers. Here the plaintiff is himself an attorney of the Court, and the Court has authority to refer his bill for taxation if any items are for work and labour performed as an attorney. Now, preparing a warrant of attorney comes within the scope of that general rule, and, therefore, it is an item liable to taxation, and will draw after it other items. In *Sandomn* v. *Bourn*(c), it was held that a bill was taxable which contained a charge for the preparing of a warrant of attorney, with a view to business to be done in Court; and in *Weld* v. *Crawford*(d), it was held that if one item of an attorney's bill be for preparing a warrant of attorney to confess a judgment, a bill must be delivered according to the statutes, although the warrant has not been

(a) 3 B. & A. 486. (b) 2 Chit. Rep. 155 (c) 4 Campb. 68.
(d) 2 Stark. 538.

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executed. Upon the authority of these cases, and on general principle, the plaintiff's bill is taxable.

ABBOTT, C. J.—We are all of opinion that this rule must be made absolute. This is an application to delay the proceedings in the action until the items of the bill are taxed, and the question does not arise whether it is a case in which the attorney is bound to deliver a bill according to the statute. The question in *Burton* v. *Chatterton* was whether there was any necessity for the plaintiff to deliver a bill, and not whether the bill itself was taxable. Independently of the statute, the Court still retains the power, and has constantly exercised the right at common law of directing the taxation of any attorney's bill. The plaintiff is an attorney of this court, and is as our officer under our control. We therefore, have no hesitation in saying that his bill must be referred for taxation.

PER TOTAM CURIAM. Rule absolute (*a*).

(*a*) Vide *Ex parte Prickett*, 1 New Rep. 266. *Winter* v. *Payne*, 6 T. R. 645. *Collins* v. *Nicholson*, 2 Taunt. 321. *Lee* v. *Wilson*, 2 Chit. Rep. 63. *Nuttall* v. *Marr*, ante, vol. iii. 33. Tidd, 8th ed. 328. et seq.; and 1 Archbold's Prac. 29 & 31.

Saturday, July 3.

SMITH *v.* MATHAM.

Motion to strike an attorney off the roll for signing a fictitious name to a demurrer, as and for the signature of a barrister.

ARCHBOLD on a former day obtained a rule calling on the defendant's attorney to shew cause why he should not be struck off the roll, for signing a special demurrer with a fictitious name, purporting to be that of a barrister. The plaintiff had delivered a declaration erroneously entitled, to which the defendant's attorney demurred specially, and the demurrer was signed "*T. Symes.*" as and for the signature of a barrister. Upon taking out a summons to amend the declaration on payment of costs, the defendant's attorney demanded a fee of 10*s.* 6*d.* for counsel's signature to the de-

murrer. After diligent inquiry and search at all the Inns of Court, it was ascertained that there was no gentleman at the English Bar of the name of *Symes*; whereupon the present rule was moved.

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SMITH v. MATHAM.

The Court granted a rule nisi.

STORER *v.* RAYSON.

Saturday, July 3.

The affidavit to set aside the service of process in a wrong county must *in terms* state that the place of service is not on the confines of the county into which the process originally issued.

LANGSLOW moved to set aside the service of the writ of latitat in this case for irregularity; the irregularity complained of being that the writ was directed to the sheriff of *Leicestershire*, and served on the defendant at *Cottingham*, in *Northamptonshire*, where he resided. [The *Court* desired to know whether the affidavit negatived *in terms*, the fact of the place where the defendant was served being on the confines of the county of *Leicester*?] That is not necessary. The affidavit expressly states that there is no doubt or dispute as to the place where the writ was served being in the county of *Northampton*, and that is sufficient according to the cases of *Chace* v. *Joyce*(a), and *Hammond* v. *Taylor*(b). All that can be required on the part of the defendant, is to shew affirmatively that the place of service is in a different county from that into which the writ was directed. There is no sensible reason why he should state that the place is not on the confines of the county, if he shews, as a fact, that it is in a different county. He is not obliged to do both. If this service is held good, all the inconveniences pointed out by Lord *Ellenborough* in *Chace* v. *Joyce* will ensue. There it was said, that although non-bailable process may be served "without the intervention of the sheriff, yet it *may be* delivered to the sheriff, and he *may be* required to execute it. But it can never be contended that he could be called upon to serve it out of his county, or that he could justify entering the house or

(a) 4 M. & S. 412. (b) 3 B. & A. 408.

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coming on the land of the party, out of his county, for the purpose of serving it. And if so, why shall any other person, by taking the execution of the process into his own hands, arrogate to himself a more extensive jurisdiction? The consequence of establishing the practice contended for by the plaintiff in this case would be, that in future no bill of *Middlesex* would ever be sued out, but in all cases a latitat would issue to the Sheriffs of *London*, or the Sheriffs of *Surrey*, whether the party to be served lived in *Cornwall* or *Cumberland*." All that the Court can require to be satisfied of is, whether the writ is served in the county, to the sheriff of which it is directed. If it is not shewn that it is, then the service is irregular, and whether the place be or be not on the confines of the county, can have nothing to do with the question.

ABBOTT, C. J.—It is every day's practice to consider the service of the writ good, if the affidavit does not negative the fact of the place of service being on the confines of the county. I see no reason for departing from that practice, and therefore we cannot grant this rule (*a*).

Rule refused (*b*).

(*a*) *Littledale*, J., was absent.

(*b*) See Tidd, 8th edit. 168. 2 Archb. Prac. 314. ——— v. *Walters*, 1 Chit. Rep. 14. *Swiss* v. *Williams*, Id. 15; and *Williams* v. *Gregg*, 7 Taunt. 233. 2 Marsh. 550. S. C.

Monday, July 5.

W. TYLER v. J. JONES, Gent. one &c.

Where, by the terms of an order of reference at nisi prius, the arbitrator was to deliver his award to the parties, *or if either of them should be dead before the making of the award*, to their personal representatives, respectively requiring the same, on or before a particular day, with power to enlarge the time for making the award, and the plaintiff having died before award made, and the arbitrator having enlarged the time after the death of plaintiff: Held, that an award made afterwards was valid and binding upon the defendant.

CASE against an attorney for negligence in not properly investigating the title to an annuity. Plea, not guilty. By an order of nisi prius, made at the *London* Sittings, before *Abbott*, C. J., on the 17th *January*, 1823, it was ordered that a verdict should be found for the plaintiff with 1,000*l*.

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damages, and 40*s.* costs, subject to the award of a barrister, to whom all matters in difference between the parties were referred, so that he should make and publish his award in writing of and concerning the matters thereby referred, ready to be delivered to the parties, or either of them, "*or, if they, or either of them, should be dead before the making of the award, to their respective personal representatives, requiring the same,*" on or before the first day of *Hilary* Term next ensuing the date of the order, with liberty to the arbitrator to enlarge the time for making his award. The arbitrator enlarged the time until the last day of *Easter* Term of this year. In the month of *January* the plaintiff in the action died, and on the 19th *April*, being about three months after the death of the plaintiff, the arbitrator made his award; and thereby adjudged that the plaintiff had a good cause of action against the defendant to the amount of 500*l.* to which sum he ordered the verdict entered for the plaintiff to be reduced, and the verdict to be entered for that sum with costs; and he further ordered that the plaintiff or his personal representatives should, on the request of the defendant, and at his expense, assign over to the defendant or to such person as he should require, the annuity mentioned in the declaration in the said action, and that the plaintiff or his personal representatives should permit his or their name or names to be used in any action or proceeding in which it should be necessary so to do, for the recovery of any part of the said annuity or the arrears thereof, at the request of defendant, his executors, administrators or assigns, upon being indemnified against all costs which might arise from the use thereof. The order of nisi prius having been made a rule of Court,

Nolan, in *Easter* Term, obtained a rule to shew cause why the award should not be set aside, on the ground that the arbitrator had exceeded his jurisdiction, in proceeding to make his award after the death of the plaintiff. In the same term *Marryat* obtained a rule nisi for entering up

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judgment on the verdict as of *Hilary* Term, 1823, on the personal representative of the plaintiff undertaking to assign the annuity to the defendant. Both rules now came on together.

Marryat shewed cause against the rule for setting aside the award. It is not disputed, that but for the special provision introduced into the order of nisi prius, the death of either party before award made would be a revocation of the arbitrator's authority. Such a consequence was, however, guarded against by introducing a special provision empowering the arbitrator to make his award notwithstanding the death of either party, and deliver it to the personal representative of either, as the case might be. The inconvenience frequently resulting from the neglect to provide against the death of either of the parties to a reference, had induced the Court, in *Cooper* v. *Johnson* (*a*), to suggest the propriety of introducing such a clause in future. The Court there observed, that "it would be well that in future the orders of reference at nisi prius should contain a clause so as to make the award binding notwithstanding the death of one of the parties. This would prevent a great deal of inconvenience, and would prevent the repetition of motions of this kind." The clause here providing against the death of either of the parties was introduced in conformity with that suggestion, and removes the objection now made to the award.

Nolan and *Abraham*, contrà. The question arises solely on the construction to be put upon the particular clause introduced into the order of reference, and it seems obvious from the terms of it, that the arbitrator has exceeded his authority. An order of nisi prius may be so framed as to bind the personal representatives or executors of either party dying before award made, but the order in question has not that effect. The arbitrator is authorised to make his award ready to be delivered to the parties or

(*a*) 2 B. & A. 394. 1 Chitty Rep. 183. S. C.

either of them, or if they or either of them should be dead, before the making of the award, to their respective personal representatives requiring the same, *on or before the first day* of *Hilary* Term *next ensuing the date of the order.* It is true that the arbitrator was authorised to enlarge the time for making his award; but this must be understood to mean, whilst the parties are both alive. He had no power to enlarge subsequent to the death of either. The power of enlargement ceased upon the death of the plaintiff, and therefore the arbitrator having enlarged the time for making his award after the death of one of the parties, his award is completely void. If both parties had lived to abide by it, the arbitrator's power of enlargement would have been binding. But as, by the terms of the reference, the arbitrator was to make his award on or before the first day of *Hilary* Term, and as the last enlargement took place after the death of the plaintiff, the arbitrator's power was gone, and his award is not binding. [*Abbott*, C. J. It does not appear that the last enlargement was since the death of the plaintiff; nor does it appear that the plaintiff did not acquiesce in the enlargement. There is not the slightest imputation upon the arbitrator in that respect.] This rule is to set aside the award because it is void. [*Abbott*, C. J. If it is void it does not require setting aside. *Bayley*, J. It does not follow, that because the award is not set aside the Court will order judgment to be entered up, so as to make the plaintiff, or his representative, a specialty creditor.] But, secondly, the arbitrator has in this instance directed the plaintiff, or his personal representative, to assign to the defendant the annuity deed in question. What remedy has the defendant against the plaintiff's personal representative to enforce that part of the award? It is impossible for him to compel the executors or personal representatives to perform that part of the award. Therefore, on that ground, the death of the plaintiff was a revocation of the arbitrator's authority. The award directs the verdict to be entered for

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500*l.*, and by way of inducement (though the defendant has been guilty of supposed negligence in respect of the annuity) directs the plaintiff, or his personal representative, to assign the annuity, and to consent to his or their names being used by the defendant, when required, for the recovery of any part of it. Now there is nothing to bind the personal representatives to the performance of this part of the award; for as they are no parties to the rule of reference, it is clear that they are not liable to an attachment. [*Abbott*, C. J. We can compel the executor to enter into a rule to assign the securities, and to allow his name to be used in recovering the annuity, without regard to the terms of the award.] Still no attachment would lie against the executor for not performing the award. [*Bayley*, J. That may be so, but the executor may be liable to an action upon the promise of his testator.]

ABBOTT, C. J.—This is an application to set aside an award; and the ground for setting it aside is, that the plaintiff, for whom a verdict was taken at the trial, and in whose favour, as far as regards the verdict, the award is made, died before the award was in fact made. Looking at the special terms of the rule of reference, I think the sound construction of it is, that the death of either party within the time fixed, either in the first instance, for making the award, or that fixed afterwards by the arbitrator, does not itself revoke the arbitrator's authority, nor make his award void. Cases may arise in which, although we should not say that the award was void, yet if we saw that any injurious use could be made of it, we might restrain the person in whose favour it was made from committing that injury. In this case no injurious use can be made of this award. All that justice requires will be now done. The plaintiff's personal representative will be at liberty to enter up judgment for 500*l.* and must by name enter into a rule of Court, in the terms of the directions of the award, that he will, at the request and at the expense of the defendant, assign over the securi-

ties for the annuity to him or such person as he shall require, and allow the defendant to use his name in bringing any action that may be requisite for recovering arrears, and upon receiving an indemnity against all responsibility in that respect. By this mode of proceeding, justice will be done to all parties.

BAYLEY, J. and HOLROYD, J. concurred (*a*).

The rule for setting aside the award, upon the personal representative of the plaintiff entering into a rule to assign the annuity pursuant to the arbitrator's award, was made absolute (*b*).

(*a*) *Littledale*, J. was absent.

(*b*) Vide 2 B. & P. 13. *Potts* v. *Ward*, 1 Marsh. 366. *Toussant* v. *Hartop*, 1 J. B. Moore, 287. and *Rhodes* v *Haigh*, ante, vol. iii. 608.

The KING *v.* The Inhabitants of NEWARK-UPON-TRENT.

Monday, July 5.

Where, pursuant to an order of *county* Justices, overseers of a *county* parish bound one of their paupers apprentice to a master residing in a *borough* within the same county, having Justices with exclusive jurisdiction therein, *and gave no notice of such binding to the overseers of the borough parish*:—Held, that the indentures were void by 56 *G.* 3. c. 139. and that a service under them gained the pauper no settlement. *Abbott*, C. J. dissentiente.

BY an order of two Justices of the borough of *Newark-upon-Trent*, *William Hales* and his wife, and *Mary* their child, were removed from the parish of *Newark-upon-Trent* to the township of *North Collingham*, both in the county of *Nottingham*. The sessions, on appeal, quashed the order, subject to the opinion of this Court on the following case:—

The pauper, *William Hales*, a poor boy of, and then legally settled in, the parish of *North Collingham* in the county of *Nottingham*, was on the 18th *June*, 1817, pursuant to an order of two county Justices, bound apprentice by the churchwardens and overseers of the said parish, to *Edward Sutton*, of the parish of *Newark-upon-Trent*, in the borough of *Newark-upon-Trent*, in the county of *Nottingham*, by indenture, for the term therein mentioned. A premium of 10*l.* was given with the apprentice to the mas-

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ter by the said churchwardens and overseers, although only 5*l.* is set forth in the indenture as the sum paid. The two Justices who signed the aforesaid order, afterwards signed and sealed their allowance of the said indenture of apprenticeship before the same was executed by any of the other parties thereto. The said parishes of *North Collingham* and *Newark-upon-Trent* are distant from each other about six miles, and in the same county. *No notice whatever was given to the overseers of the poor of the parish of Newark-upon-Trent*, or to any of them, of the intention to bind out such apprentice, nor did they, or any of them, attend before the Justices who signed the said order, and allowed the said indenture, nor was any such notice alleged or attempted to be proved to have been given; but the said Justices allowed the said indenture without any proof of service, or admission of notice. *Newark* is a borough, situate in the county of *Nottingham*, having Justices who have exclusive jurisdiction therein. The pauper resided, under this indenture, in *Newark-upon-Trent* aforesaid, more than forty days. The question for the opinion of the Court is, whether notice ought to have been given to the overseers of *Newark-upon-Trent* of the intention to bind the pauper in that parish, in order to give validity to the indenture, and confer a settlement on the pauper by a service under it, according to the true construction of the statute 56 *Geo.* 3. c. 139.

The case was argued at considerable length last Term by *Chitty*, who contended that such notice was necessary; and by *Scarlett* and *Balguy*, contrà. At the close of the argument,

ABBOTT, C. J. observed, that as this was the first time the Court was called upon to put a construction upon this act of parliament, his learned brethren and himself would take time to consider of it.

Cur. adv. vult.

The Court now delivered its judgment; but inasmuch as the Lord Chief Justice differed in opinion from his learned brethren, the Judges delivered their reasons severally, the junior puisne beginning:—

Littledale, J.—The question in this case arises upon the construction of the statute 56 *Geo.* 3. c. 139. The preamble recites, that grievances have arisen from the binding of poor children apprentices to improper persons, residing at a distance from the parishes to which such children belong; and the first section directs, that before any child shall be bound apprentice by the overseers of the poor of any parish, such child shall be carried before two justices of the county wherein such parish shall be situate, who shall inquire into the propriety of binding such child to the person proposed; and shall particularly inquire whether the person proposed reside or carry on his business within a reasonable distance from the place to which such child shall belong, or whether circumstances make it adviseable that such child shall be bound at a greater distance; that the justices shall examine the father and mother of such child, and inquire into the circumstances of the person proposed as the master, and if upon such examination and inquiry they shall think it right that such child should be bound, they shall make an order that the overseers shall be at liberty to bind such child apprentice, which order shall be delivered to such overseers as their warrant for binding such child, and the indenture shall refer thereto, and the justices shall sign their allowance of such indenture before it is executed by any of the parties thereto. Provided that no such child shall be bound apprentice to any person residing or carrying on a business in which such child shall be employed out of the county, at a greater distance than forty miles from the place to which such child shall belong, except such child shall belong to a place more than forty miles from the city of *London*. Then the second

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section enacts, that in all cases where the residence or establishment of business of the person to whom any child shall be bound, shall be *within a different county or jurisdiction of the peace*, than that within which the place by the officers whereof such child shall be bound, shall be situate; and in all other cases where the justices for the district or place, within which the place by the officers whereof such child shall be bound shall be situate, and who shall sign the allowance of the indenture by which such child shall be bound, shall not have jurisdiction, every indenture by which such child shall be bound shall be allowed as well by two justices for the county or district within which the place by the officers whereof such child shall be bound shall be situate, *as by two of the justices for the county or district within which the place wherein such child shall be intended to serve, shall be situate*. Provided that no indenture shall be allowed by any justice for the county into which any such child shall be bound, who shall be engaged in the same business in which the person to whom such child shall be bound is engaged. And notice shall be given to the overseers of the poor of the parish in which such child shall be intended to serve, before any justice for the county within which such parish shall be, shall allow such indenture, and such notice shall be proved before such justice shall sign such indenture, unless one of such overseers shall attend such justice and admit such notice. Then the third section provides that the allowance of two justices for the county within which the place in which such child shall be intended to serve shall be situate, shall be valid and effectual, although such place may be situate within a town or liberty, within which any other justices may in other respects have an exclusive jurisdiction. And, lastly, the fifth section enacts, that no settlement shall be gained by any child who shall be bound by the officers of any parish by reason of such apprenticeship, unless such order shall be made, and such allowance of such indenture signed, as hereinbefore directed. Now, by the

statement in the case, it appears that the apprentice originally belonged to the parish of *North Collingham*, in the county of *Nottingham*, and that he was bound apprentice by the churchwardens and overseers of that parish, to a person residing in the parish of *Newark-upon-Trent*, in the borough of *Newark-upon-Trent*, in the county of *Nottingham*, in which borough the justices have an exclusive jurisdiction. It appears that the justices who signed the order for the binding of this apprentice resided in the county, but that no notice was given by the overseers of *North Collingham* to the overseers of *Newark-upon-Trent*; and we are to say whether or no any settlement could be gained by service under such a binding. To determine this point, it is not necessary to consider whether notice in all cases ought to be given, or whether the necessity of notice to the overseers of the parish into which the child shall be bound, is to be confined to the case where the child is bound into a parish, within a district, the justices of which have a different jurisdiction from that of the justices of the parish to which the child may belong. There seem to me to be reasons for holding that in the same county notice is not necessary, because the county justices have more power and better means of information, by communicating with the overseers within their own jurisdiction, so as to point their inquiries with more effect as to the propriety of the binding, the circumstances and character of the intended master, and the opportunities which the child will have of acquiring a knowledge of his business: whereas in a foreign county, the justices are less acquainted, and have not the same means of communicating with the overseers, nor the same means of inquiring into the circumstances of the case. Again, it appears from the second section of the statute, by which the notice is required, that notice would not be necessary where the binding is into the same county; because, as that section begins with making provisions for cases in which the binding is into a different county, all its provisions must be construed as having reference to cases of

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that kind. This reason cannot, indeed, be considered as conclusive, because the division of the statute into sections is a mere arbitrary act, and cannot afford any rule for the proper construction of any of the sections. The only true guide for the right interpretation of any clause, is to look into the language of the clause itself, and to compare it with the other enactments of the statute, without attending to its division into sections. Undoubtedly, a great deal may be said upon both sides of the question, arising from the form in which the different sections are framed. In the first section there is no express mention of notice at all; that appears for the first time in the second section, and there is so much variation of the phraseology of that section, in the different parts of it, and with reference to the first section, that it is perhaps not easy to reconcile the two. Without, however, entering into a discussion on that point, I think it is clear that where the binding is into a different county, notice is indispensably necessary, unless it can be said, either, that the second section, which requires notice, is merely directory, or, that the clause in the third section, which provides "that the allowance of two justices for the county within which the place in which such child shall be intended to serve shall be situate, shall be valid and effectual, although such place may be situate within a town or liberty, within which other justices may, in other respects, have an exclusive jurisdiction," does away the necessity of notice, where the justices actually exercise the power so vested in them. In the first place, I am of opinion, that the second section is not merely directory. The object of that provision seems to be, that the overseers of the parish situated in the foreign county, may assist the justices of the county in which the binding parish is situated, with all the information they possess upon the matters submitted to their investigation, and therefore the notice to those overseers seems to be essential; though, certainly, the fifth clause, which declares, that no settlement shall be gained unless such and such provisions are complied with, contains

no mention of notice to the overseers. The words are, "that no settlement shall be gained by any child who shall be bound by the officers of any parish by reason of such apprenticeship, unless such order shall be made, and such allowance of such indenture of apprenticeship shall be signed, as hereinbefore is directed;" which seems to be tantamount to saying, that if the order is made, and the allowance is signed, the binding shall confer a settlement, although no notice is given. But, as the second section directs that the justices of the foreign county shall not allow any indenture, until notice has been given to the overseers, and shews therefore that the service of notice upon the overseers is a duty precedent to the allowance of the indenture by the justices; the clause in the fifth section, requiring the allowance of the justices, must, I think, be taken as embodying the provision in the second section, and therefore as meaning an allowance after notice. Then, in the second place, is the notice to the overseers rendered unnecessary, where the justices for the county exercise the powers vested in them by the third section? It is certainly not dispensed with, in terms, by the third section, and I can see no reason why it should be dispensed with, merely because the justices for the county put themselves in the place of the justices for the foreign district. By so doing, they cannot acquire larger power than belongs to the persons whom they thus represent; and as the justices for the foreign district cannot, by the second section, allow the indenture, until notice has been given to the overseers, it follows that the justices for the county, acting in a representative character, have only a conditional power of allowing the indenture, namely after the overseers have had notice. It may be argued, that by the third section the separate jurisdictions are all swallowed up, and made to form parts of the county, for the purposes of this act; and that the powers vested in the county justices, place them precisely in the same situation, with respect to those districts, as if they had an original jurisdiction over them, so

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that they are entitled to act as if those districts were actually parts of their own county. Assuming that argument to be correct, it becomes necessary to consider, whether the statute requires notice in all cases, including those of bindings into the same county; but the statute certainly does not in express terms give the county justices any such power as that argument supposes, nor, in my opinion, is it probable, that the legislature had any such intention; because, if the motive for requiring notice is, that the justices for the county within which the binding parish is situated, have not the same means of communication, or the same sources of information, in the foreign county, as they have in their own; they may, if no notice is given, bind the child into a county, where they are unable to obtain that full knowledge and information which the statute makes it incumbent on them previously to obtain. The third section is not compulsory upon the county justices; the district justices may still allow the indenture, after notice to the overseers; there may, therefore, be two children bound out of the same parish into the same foreign district by two different modes: one by the county justices only, (and here I do not include the binding overseers,) and another by the county justices, coupled with a notice to the overseers, and the allowance of the foreign district justices. Now the latter binding would, in all probability, be done after a much fuller investigation and inquiry than the former, and therefore the two bindings would be accompanied by different degrees of information as to the propriety of the binding. It may be said, that the statute expressly authorises the county justices to allow the indenture, where the child is bound into a foreign district, and that, therefore, under such circumstances, the binding will be effected without the full and proper means of inquiry and information. But, I think, that evil can hardly occur, because there will be very nearly the same information obtained, as if the indenture were allowed by the foreign district justices; for the overseers, when they have received notice, will collect

what information they can, and will communicate it to the county justices, before the indenture is allowed. I am, therefore, of opinion, that the indenture in this case is rendered invalid by the want of notice to the overseers, and consequently that the pauper acquired no settlement by service under it.

Holroyd, J.—This was the case of a binding by the churchwardens and overseers of a parish within the county of *Nottingham*, made under the allowance of two justices for that county, to a master resident within the parish and borough of *Newark-upon-Trent*, within the same county, but in which other justices have an exclusive jurisdiction. The question for our consideration turns upon the construction of the statute 56 *Geo.* 3. c. 139; section 3 of which provides, that the allowance of two justices for the county within which the place in which such child shall be intended to serve an apprenticeship shall be situated, shall be valid and effectual, although such place shall be situated within a town or liberty within which other justices may, in other respects, have an exclusive jurisdiction. The objection, however, arises upon the proviso at the close of section 2., which requires notice, or proof, or admission of notice, to the overseers of the parish in which the apprentice is to serve, before the allowance of the indenture; and the question is, whether such notice, or proof, or admission of it, was necessary in the present case. I am of opinion, that it was, and that for want of it, this indenture was invalid, and no settlement was gained by service under it. The proviso as to notice appears to me not to be directory only, but I think the want of it goes to affect the settlement itself. Section 5, which enacts, that no settlement shall be gained by any child who shall be bound by the officers of any parish, by reason of such apprenticeship, unless such order shall be made, and *such* allowance of such indenture shall be signed as previously directed, does not indeed go on to enact, " that no settlement shall be gained unless such

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notice shall be given;" but, in cases where notice is required, unless the notice was previously given, the allowance would not be *such* as the statute requires, and therefore would be null and void, because where an act of parliament gives a magistrate a special and limited authority, his acts are null and void unless he complies with the regulations and restrictions so imposed upon him. I presume that the legislature, in requiring this notice, had two objects in view, the benefit and welfare of the apprentice, and the protection of the parish into which he was to be bound, and for both those objects the notice would be useful before the binding was complete; as respects the information, the overseers might give the magistrates, first, as to the character, conduct, habits, and circumstances of the intended master; and second, as to the particular trade, its extent in the parish, the number of apprentices engaged in it, and the probability of the child being able thereafter to maintain himself by it, or becoming a burthen upon the parish. And this would be equally material whether the binding was to be into a parish within the same, or a different county; because, in either case, the parish might be equally aggrieved by the binding, and by the want of notice, as they might thereby lose their right of appeal, which, by section 17, can be exercised only within a limited period. In order to remedy the grievances enumerated in the preamble of the act, section 1 enacts, that where the binding is to be into the same county, the county justices shall inquire into all these circumstances, and shall sign the allowance; and section 2, in addition provides, that where the binding is to be into a different county, two justices of that county in which the apprentice is to serve, shall concur in making the inquiry, and in signing the allowance. Then comes the proviso upon which the present question is founded, which is printed as a part of section 2; but whether it is to be taken as a part of that section, or as constituting a separate one, is wholly immaterial to the construction of the statute; for on such occasions, in order to decide whether a proviso

partially or wholly relates to the *immediately* preceding provisions, so as to qualify, restrain, or vary their operation, or relates partially or wholly to *all* the preceding matters of the statute, we must look at the statute as a whole, at its language, object, and import, and not to the arbitrary division of it into different sections. The proviso is, "that no indenture shall be allowed by any justice for the county *into which such child shall be bound*, who shall be engaged in the same business, employment, or manufacture, in which the person to whom such child shall be bound is engaged." Now this part of the proviso I think is confined to the allowance of magistrates not of the same county, and refers only to cases where there is a binding from one county into another, and the expression, "the county into which such child shall be bound," appears to me the mark by which the legislature intended to point out that the construction of this part should be so confined, for it evidently implies that there is another county *out of which* the child shall be bound. The proviso then goes on, "and notice shall be given to the overseers of the poor *of the parish or place in which such child shall be intended to serve an apprenticeship*, before any justice *for the county or district within which such parish or place shall be*, shall allow such indenture, and such notice shall be proved before such justice shall sign such indenture, unless one of such overseers shall attend such justice, and admit such notice." Here the language is changed, and we have expressions, with respect both to the justices and the overseers, which seem to me to apply to both descriptions of bindings, for here the notice is required to be given, not to the overseers "of the parish or place within the county into which such child shall be bound," but to the overseers "of the parish or place in which such child shall be intended to serve an apprenticeship, before any justice for the county or district within which *such* parish or place shall be, shall allow such indenture;" that is, the parish or place in which the child is intended to serve, whether it be within the same or a different county. Here the

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legislature having intended, as I think, to restrict the first part of the proviso to bindings into a different county, and having clearly expressed that intention, adopts a different and more extensive mode of expression, which comprehends the whole object of the statute, namely, parish apprentices and bindings generally, and not merely bindings into a different county. This proviso is immediately followed by another in section 3, which runs thus: "Provided always, and it is hereby declared, that the allowance of two justices *for the county within which the place in which such child shall be intended to serve an apprenticeship shall be situated*, shall be valid and effectual, although such place may be situated in a town or liberty within which any other justices may in other respects have an exclusive jurisdiction." It is admitted that this section applies to parish apprentices and bindings in general, and yet the language is the same as that of section 2. Unless the proviso in section 3 extends to parish apprentices bound to serve in the same county, the want of an allowance by two justices for the exclusive jurisdiction of *Newark-upon-Trent*, would be fatal to the settlement claimed in this case; and if it does so extend, then, I would ask, by what rule of construction is it to be said, that there is to be a different mode of interpretation given to the proviso in the second, from that which is given to the proviso in the third section? If the same mode of interpretation is to be given to both, then no settlement has been gained in *Newark*, for in either case the indenture is ineffectual for that purpose; in the former, for want of the allowance of two justices of *Newark* as an exclusive jurisdiction; in the latter, for want of notice to the overseers of *Newark*. I think the term, "such child," in the proviso in section 2, includes parish apprentices in general; and that the terms, "such parish or place," and "such indenture," and "such justice," there, as well as the term "such place," in section 3, mean the place in which the apprentice is intended to serve, and the indenture by which he is bound so to serve, whether the binding is into the same, or into a

different county. In the present case, the overseers of the parish of *Newark*, in the borough of *Newark*, are the overseers of the parish in which the child was intended to serve his apprenticeship; and, I think, they were within the description of persons entitled to notice within the words of the proviso, although their parish is in the same county as the binding parish: and no such notice was given them. If they are within the *words*, they must also be taken to be within the operation of the proviso, more especially as the notice, I think, must be taken to be for the protection of the apprentice himself, unless a different intent can be gathered from the context. As it seems to me, no such different intent can be so gathered, but an inference directly the contrary must be drawn, the evident intent being, that notice should be given to the overseers of the parish in which the apprentice is to serve, in all cases, whether the binding is into the same, or into a different county. I have considered this case in great measure without regard to the circumstance of the binding being into a different jurisdiction, taking it merely as a binding into the same county, under the idea that by the third section the circumstance of an exclusive jurisdiction is immaterial. It may perhaps be a question, whether that section, by making valid an allowance by the county justices without the co-operation of the district justices, does away the necessity of notice to the overseers, if notice were otherwise necessary; but in the view I have taken of the case, I do not feel it requisite to consider that point. For the reasons I have given, I am of opinion, that the pauper did not acquire a settlement in the parish of *Newark-upon-Trent*.

Bayley, J.—This case has been so fully discussed by my Brothers *Holroyd* and *Littledale*, with whom I agree, that it is the less necessary for me to enter at length into the grounds upon which my opinion is founded. The first section of the statute applies generally to all cases, and directs what the justices and the overseers are in *all* cases to

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do, and it imposes no qualification as to the justices, nor does it contain any restriction, except as to the distance of the master's residence and business. The 2d section introduces two provisions, one to exclude justices who may be supposed to be interested, being of the same business with the intended master; the other to require notice to the overseers of the parish in which the apprentice is to serve. Whether these provisions, or either of them, are general and applicable to all cases, or whether they are confined to the particular cases contemplated in the earlier part of that section, may admit of doubt; for the nature of the provisions has a tendency to shew that they are general, while their position in the act has a directly contrary tendency. If they are intended to be general, the first question is, whether this case is within the earlier part of the 2d section; and if it is, then there arises another question, namely, whether the case is taken out of the 2d, by the operation of the 3d section. The earlier part of the 2d section contemplates two distinct cases; the one, where the master's residence or business is in a different *county or jurisdiction* from that of the binding parish, and the other, where the justices for the *district or place*, in which the binding parish is, have not jurisdiction: in either of which cases it provides, that the indentures shall be allowed as well by two justices for the *county or district* within which the binding parish is, as by two justices for the *county or district* in which the apprentice is intended to serve. In this case the binding parish is *North Collingham*, which is within the county of *Nottingham*, and the parish in which the service was to be, is *Newark-upon-Trent*, which is within the borough of *Newark-upon-Trent*, and in which the county magistrates have no jurisdiction. The master, therefore, carried on his business in a different jurisdiction from that of the binding parish, which brings the case within the words of the first clause of the 2d section; and the justices of the place in which the binding parish is, have no jurisdiction, which brings the case within the words of the

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2d clause of that section: and I can find nothing in principle, or in the other provisions of the statute, that excludes it from either. The object of the act was to give protection to parish apprentices, and to enable magistrates to prevent abuses in binding them out, and it is consistent with and in aid of that object, that the act should extend to every case that can fairly be brought within its operation. The only ground upon which, as it seems to me, any doubt can be raised upon the meaning of the legislature in this respect, is the variation of the phraseology used with reference to the justices. In the first section they are called "the justices of the peace for the county, riding, division, or place;" in the 2d, in one part of it, "the justices of the peace for the district or place," and in another part, "the justices of the peace for the county." Whether this variation was accidental or intentional I cannot discover, but, be that as it may, I think the language is too loose to form a ground for a court of justice to act upon, and to say that a different operation was intended by the difference of phrases thus adopted. I am, therefore, satisfied that this case is within the 2d section, unless it is taken out of it by the 3d section. That section provides that an allowance by two justices of the "*county*," dropping the words "district or place," in which the place of service is situate, shall be valid, although that place is within a town or liberty where other justices have an exclusive jurisdiction. It does not state that such township or liberty shall, for the purposes of this act, be deemed to be a part of the county in which they are situate; but simply that the allowance of two justices for the binding county shall be valid. It does not in terms supersede the excluding restriction, that the justices shall not be of the same business, nor does it expressly dispense with the notice to the overseers; and, it seems to me, the true construction of the 3d section is, that in a case like this, to which both the 2d and 3d sections are applicable, the allowance by the original magistrates, as required by the 1st section, is not sufficient, unless they are exempt

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from the excluding restriction of the 2d section, as being of the same business with the master, and unless notice has been given to the overseers of the place in which the apprentice is to serve. If the service is to be in the same county out of which the binding is, then the justices of that county may, from their situation as the acting bench of magistrates, be fairly supposed to be fully acquainted with all the circumstances of every part of their own county, so as to render information from the overseers to them unnecessary: but in places of exclusive jurisdiction, though within their own county, where they have no right to interfere, and of the circumstances of which they may have no knowledge, that may not be the case, and the information of overseers may be particularly necessary and useful. I am, therefore, of opinion, that in this case there ought to have been a notice to the overseers of the parish in which the service was to be, before the binding took place, and that for want of such notice the indenture was invalid, and no settlement has been gained by service under it.

Abbott, C. J.—I have the misfortune to differ from my learned brothers on this occasion, and notwithstanding the great and unfeigned respect I entertain for their opinions, I still think that a settlement has been gained in *Newark*, under the circumstances of this case. It is not necessary to repeat the facts: the question arises upon the statute 56 *Geo.* 3. c. 139. By the 5th section of that statute it is declared, that no settlement shall be gained by any apprentice, unless such order shall be made, and such allowance of such indenture shall be signed, as thereinbefore directed. The statute, in some of its directions, is introductory of a new law, and as non-compliance with its directions will prevent the gaining of a settlement, I apprehend, that according to general principles the construction of the statute should not be carried beyond the plain and obvious meaning of the language of its directions, upon any supposition that a case, not within that meaning, may be within the mis-

chief intended to be remedied, or within the reasons upon which the directions may be supposed to have been founded. I think the directions of this statute may properly be divided into two classes, the first applying to every case of binding a parish apprentice, and the second applying only to certain particular bindings with respect to the local authority of the justices of the peace. I consider all the directions of the first class to be arranged in order together, and to form the 1st section of the statute; that those of the second class are in the same manner arranged in order together, and form the 2d section; and that the 3d section is explanatory only of the jurisdiction of the justices. The directions of the first class are three. First, the duty of the justices to inquire into the fitness of the master, the distance of his residence, and other particulars in which the interests of the apprentice are concerned. Second, if upon inquiry they approve of the binding proposed, to make an order authorising the overseers to bind the apprentice, and which order is by the terms of the statute to be delivered to the overseers as their warrant for binding the apprentice, and to be referred to in the indenture by the date and the names of the justices: and, third, the signature of the allowance of the indenture by the justices, after the making of the order, and before the execution of the indenture by any of the other parties to it. These apply to every case of every binding, without regard to the jurisdiction within which the master's parish may be situate, and are followed by a proviso applicable to them, not containing any general regulations as to the binding of an apprentice to serve in a different county; but prohibiting the binding him to serve in a different county at a distance of more than forty miles from the parish to which he belongs, except that parish is more than forty miles distant from *London*, in which case the justices, when the binding is to a place more than forty miles distant, are to make a special order, specifying the grounds on which they have thought proper to allow a binding to the greater distance. Thus far all the enactments regard only the justices of the

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county to which the apprentice belongs, and whether we attend to the whole as comprising one numbered section, or look exclusively to the order and disposition of the sentences, which I think is the more correct mode of reading an act of parliament, the effect will be precisely the same. I come now to the second class of directions, which, as I have already stated, I consider to constitute the 2d section of the statute. That section provides "that in all cases where the residence or establishment in business of the person to whom any child shall be bound, shall be within a different county or jurisdiction of the peace from that within which the place, by the officers whereof such child shall be bound, shall be situate; and in all other cases, where the justices of the peace for the district or place within which the place, by the officers whereof such child shall be bound, shall be situate, and who shall sign the allowance of the indenture by which such child shall be bound, shall not have jurisdiction, every indenture by which such child shall be bound, at any time after the said first day of *October*, shall be allowed as well by two justices of the peace for the county or district within which the place, by the officers of which such child shall be bound, shall be situate, as by two justices of the peace for the county or district within which the place shall be situate wherein such child shall be intended to serve." This is, properly speaking, an *enactment*, for the sentence which immediately follows commences with the word "provided," a word, as it seems to me, intentionally and effectually introduced to qualify some antecedent matter. I think the enactment evidently requires two distinct allowances, and by two distinct classes of persons. The words "who shall sign the allowance of the indenture by which such child shall be bound," considering the place in which they are there introduced, convince my mind that the acts required by this enactment are to be performed after the allowance first required has been made, and by different persons. The enactment applies to bindings "into a different county or

jurisdiction of the peace." The legislature seem to have thought, that if those words had stood alone, a doubt might have been raised, whether the word "jurisdiction" would apply to a township or liberty, parcel of the county, but in which other justices have a local jurisdiction exclusive of the authority of the justices of the county: and to prevent that, they make mention, as it were, of another class of cases, namely, those in which the justices who shall sign the allowance shall not have jurisdiction. It is to be observed that bindings under this statute are not compulsory upon the master, so that with reference to him, and his place of residence or business, the allowance of the indenture by the justices in the first instance is not properly an exercise of a local authority. If this enactment is not subsequently controlled, a twofold allowance will appear to be requisite, whenever the master's parish, and that of the apprentice, happen to be within the general jurisdiction of different justices; and the second allowance must be by the justices of the local jurisdiction within which the master's parish is situate, whether in the same county as the parish of the apprentice or not: and if both parishes happen to be within the same county, and that of the apprentice is within a local jurisdiction, and that of the master within the county at large, the second allowance must be by the justices of the county at large. It is clear, however, that some qualification is introduced as to this matter by the 3d section, though before I notice that more particularly I beg to advert again to the 2d section. The part of that section which immediately follows that enactment before detailed, commences, as I have already observed, with the word "provided," and runs thus: "Provided always that no indenture shall be allowed by any justice of the peace for the county into which such child shall be bound, who shall be engaged in the same business, employment, or manufacture, in which the person to whom such child shall be bound shall be engaged." This proviso appears to me to relate only to those cases which form the subject of the preceding

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enactment, as well by reason of its situation in the statute, as of the expression, "into which such child shall be bound," which I consider plainly to denote a county other than that to which the child belongs, and *in which* the binding is allowed at the discretion of the justices. The following sentence is introduced by the conjunction "and," which sensibly connects it with the preceding words, and thereby confines its application to the cases just before mentioned. The sentence is this: "and notice shall be given to the overseers of the poor of the parish or place in which such child shall be intended to serve an apprenticeship, before any justice of peace for the county or district, within which such parish or place shall be, shall allow such indenture; and such notice shall be proved before such justice shall sign such indenture, unless one of such overseers shall attend such justice and admit such notice." If the act had said nothing further on the subject of the jurisdiction of the justices, I cannot satisfy my mind that it ever could have been doubted that the whole matter of this section was confined to those cases in which an allowance of the indenture by two sets of justices, belonging to two distinct jurisdictions, was required. That doubt, as it seems to me, has arisen from the matter contained in the 3d section, which begins, like the 2d, with the word "provided," and which appears to me, to form a continuation of the 2d section, and to be a qualification of those cases, and those only, which constitute the first part of that section, namely, the cases of different jurisdictions of justices. The words are these: "Provided always, and it is hereby declared, that the allowance of two justices of the peace for the county, within which the place *in which* such child shall be intended to serve an apprenticeship shall be situate, shall be valid and effectual, although such place may be situate in a town or liberty within which any other justices of the peace may, in other respects, have an exclusive jurisdiction." I consider this section as giving jurisdiction to the county justices, whether the town or liberty is within

the county to which the master only belongs, or within the county to which both master and apprentice belong; but I think it gives it only as respects the master's parish: so that, where the child belongs to a town or liberty, and is bound to a master who resides out of that town or liberty, the inquiry in the first instance as to the fitness of the master, and the original allowance of the indenture, must be by the justices of the town or liberty. So applying this section to the case before the Court, I think the question is the same as it would have been if there were no justices having an exclusive jurisdiction in the town of *Newark*, and that would be, whether, for a binding to a master residing in the same county to which the apprentice belongs, notice of the binding to the overseers of the master's parish would be necessary. I have already observed upon the situation which this clause, requiring notice, occupies in the statute, and upon its connection with the immediately preceding sentence by means of the conjunction "and," and have said that I consider such case, also, as relating only to the justices of, what I may call, the second jurisdiction. If it had been intended that notice should be given to the overseers of the master's parish, in any case, I cannot forbear thinking, that there would have been some distinct enactment to that purport, and that it would not have been left to depend upon expressions immediately following and closely connected in language with an enactment confined to certain particular cases only. I cannot say that I have discovered any reason for thus expressly requiring notice to the overseers, where the binding is into a different county, which would not apply with nearly equal force to a binding into the same county. But it must be observed, that the legislature have, in the 1st section, expressly required that the justices of the county to which the child belongs shall inquire into the fitness of the master and the distance of his residence; and it was, perhaps, presumed, that where the justices in the performance of that duty should think a notice to the overseers of the master's parish necessary, they

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would order such notice to be given, because the statute imposed no special duty of that kind upon the justices of the master's county: and, in my mode of construing the statute, there is a special qualification respecting those justices, that they shall not be engaged in the same business with the master; and the notice, therefore, may have been required in this case, as well for the purpose of supplying the absence of that inquiry which is expressly directed in the other, as of providing that the indenture shall not be allowed by any justice engaged in the same business with the master. Further, it seems to me, that if such had been the intention of the legislature, they would have introduced into the clause requiring notice such words as would have shewn that notice was to be given whether the two parishes were in the same or different counties, and that, when both parishes were in the same county, the notice should be given not only before the allowance of the indenture, which is merely a ministerial act, but before the making of the order for the binding, which is the important act: for it cannot have been meant that the same justices who had made an inquiry and an order for the binding, should afterwards give the overseers of another parish the opportunity of appearing before them, when the result of their so appearing might be the rescinding of the order. If notice to such overseers is to be required, I think it should be required in the first instance, before the order for the binding is made. If the notice is confined to the allowance of the indenture by the justices of a different county, it is required before the performance of any of the acts to be performed by them. Unquestionably the notice is required only with reference to the allowance of the indenture by the justices of the master's county. If it is required when the master's county is also the county of the apprentice, then, as I have before shewn, it will be required in some cases before the allowance of the indenture by the binding justices, and in others not; and which those cases are, as distinguished from each other, the statute will not clearly point

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out. According to my construction of the statute, the several duties imposed upon the justices of the two jurisdictions will in every case be apparent, detailed in a plain and intelligible order, free from confusion of arrangement, and perplexity of language. For these reasons, I am of opinion, that notice to the overseers is not required when the master and the apprentice are resident in one county. The statute, upon which the question has arisen, is certainly not without ambiguity. If its directions are not complied with, I have before mentioned that a settlement cannot be acquired under circumstances in which, before the passing of this act, it might have been acquired. I have felt myself bound to form my judgment upon what appeared to me to be the real sense and meaning of the words of the statute, paying due regard to the order, arrangement, and connection of the several matters contained in it; and I have the satisfaction of knowing, that if my construction is erroneous, the error will not be of any practical importance, because the opinion of my learned brothers must of course prevail, and the rule for quashing the order of sessions must be made absolute.

Rule absolute for quashing the order of sessions.

The King v. The Mayor and Aldermen of the Borough of Portsmouth.

Monday, July 5.

Mandamus does not lie to the mayor and aldermen of a borough, requiring them to assemble for the purpose of considering the propriety of removing non-resident members of their body, no serious injury or inconvenience to the inhabitants being suggested, as resulting from such non-residence.

MEREWETHER on a former day obtained a rule, calling upon the mayor and aldermen of the borough of *Portsmouth*, to shew cause why a mandamus should not issue directed to them, commanding them to assemble themselves together within the borough, and *consider of the propriety* of removing certain persons, by name, from the office of

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alderman, on the ground of non-residence within the said borough.

On shewing cause, the case disclosed upon the affidavits was this:—The town of *Portsmouth* is a borough by prescription; but by a charter of *Charles* I. that king, in the thirteenth year of his reign, granted that the mayor, burgesses and inhabitants, should be incorporated by the name of "the mayor, aldermen, and burgesses, &c.;" that there should be within the borough one alderman elected mayor, and that there should likewise be within the borough twelve other burgesses to be elected as therein mentioned, who should be aldermen; and that the aldermen for the time being should be called the council of the borough, and should be from time to time aiding and assisting the mayor in all matters and causes touching or concerning the borough; that whensoever any of the aldermen for the time being, should die or be removed from office, (which aldermen, or any of them, the king willed should be removeable *for any offence, or default*, or *reasonable cause*, at the discretion of the mayor, and the rest of the aldermen of the borough for the time being, or the greater part of them;) then it should be lawful for the mayor and the rest of the aldermen for the time being, or the greater part of them, to elect one other or more of the burgesses of the borough to supply the place of the alderman or aldermen happening to die or be removed; that any person elected mayor or alderman, refusing to accept the office after notice, should be subject to such fines and amerciaments as should seem reasonable to the mayor and aldermen, or the major part of them; that there should be a recorder elected by the mayor and aldermen; and that the mayor, aldermen and burgesses, might have a court of record to be holden before the mayor, recorder, and aldermen, or any four of them, of whom the mayor or recorder should be one, every *Tuesday*; that the mayor and recorder, and every mayor for one year, after serving the office of mayor, and three other aldermen,

should be justices of the peace for the borough, to be elected annually by the mayor, aldermen, and burgesses; and in case of death or vacating the office of alderman, another to be elected in his room. There was no clause in the charter, expressly requiring that the aldermen when elected should be resident within the borough. It was alleged in the affidavits that the aldermen, against whom this application was directed, had resided out of the borough for a great many years; and that one of them, who had been elected one of the justices of the peace for the borough, resided seven miles distance from the town, but always attended to his magisterial duties when his attendance was necessary. No inconvenience to the inhabitants of *Portsmouth* was alleged, nor was any delay of justice complained of, as arising from the non-residence of the individuals named in the rule. The only instance pointed out of a delay of justice was, that in 1817 the borough court did not sit on the day appointed, and the court adjourned until the next day. Under these circumstances, the question was, whether the aldermen were bound to reside independently of the provisions of the charter.

Scarlett, *Adam* and *Erskine*, (with whom was *Selwyn*,) shewed cause against the rule. If this case were to depend upon the merits as disclosed in the affidavits, there is no ground whatever for supporting the motion; because there is no pretence for saying that any inconvenience or delay of justice to the inhabitants of *Portsmouth* has arisen from the non-residence of the aldermen. But the decisive answer to it is, that there is not a word in the charter which imposes upon the aldermen the necessity of actually residing within the borough. The supposed authority for this application is *Rex* v. *Truro* (*a*); but that case is totally dissimilar. That was an application for a quo warranto information to

(*a*) Not reported. It was decided in *Hilary*, 1821, before this series of reports commenced.

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an individual calling upon him to shew by what authority he claimed to be a capital burgess of the borough of *Truro*, on the ground that by the express terms of the charter of that borough, no person could hold the office of a capital burgess who resided out of the borough, the fact being that the defendant had gone to reside out of the town. The Court refused the application; but upon referring to the particular words of the charter, they said that a rule nisi for a mandamus might be granted, commanding the corporation to meet for the purpose of considering whether they would or would not remove a capital burgess who had gone out of the town to dwell. That case, however, depended entirely upon the particular wording of the charter, and certainly is no precedent by which the Court can be governed in this instance. Admitting, for the sake of argument, that the charter in the present case required the aldermen to reside, still unless there was a strong case made out of inconvenience or prejudice to the inhabitants, the Court would not interfere. Non-residence is not ipso facto a ground for amotion from the office of alderman. A real and substantial grievance must be made out before this Court can interfere, and even then it would be entirely a matter of discretion with the mayor and the rest of the aldermen, whether they would or would not remove the non-resident members of the corporation. The charter gives to the mayor and aldermen a discretionary power to remove "for any offence or default, or reasonable cause;" but if no inconvenience resulted to the town from the non-attendance of some of the aldermen, they would not be justified in removing them. Here no inconvenience is suggested, no delay of justice is complained of, and therefore without some express authority, shewing that non-residence merely, is a ground of amotion, this rule must be discharged. The charter declares, that five of the aldermen shall be justices of the peace. Now four of these actually reside, and the fifth lives within a short distance of the town, and always discharges his magisterial duties. This being an application

of the first impression, and there being no pretence for it, the rule must be discharged.

Copley, A. G., *Gaselee* and *Merewether*, contra. In *Rex* v. *Monday* (*a*), which arose upon the same charter, Lord *Mansfield* decided that when an alderman was once elected, it was his duty to reside. That learned judge, speaking of the provisions of the charter, said "residence is not a precedent qualification for a burgess to be elected an alderman. All the charter requires is, that *after* he *is* elected he shall be resident." [*Abbott*, C. J. That was certainly an obitur dictum. There is nothing in the charter which warrants that position.] The use, however, to be made of what was said by that learned judge is, that it confirms what has been laid down in a variety of cases, namely, that when the charter of a corporation requires that the capital burgesses or aldermen shall be resident, it is nothing more than a declaration of the common law. In *Vaughan* v. *Lewis* (*b*), Lord *Holt* so expressed himself; and the same principle was laid down in the *City* of *Exeter* v. *Glyde* (*c*). Hence it follows, that whether a clause be or be not introduced into a charter, expressly requiring residence, is a matter perfectly indifferent, because at common law, residence is a duty incident to the office; and non-residence is a disqualification when it is satisfactorily proved. The persons against whom this motion is directed are not justices of the borough, but aldermen, whose duties necessarily require residence. By the charter, they are the council of the borough, and are required from time to time to aid and assist the mayor in all causes and matters touching or concerning the borough. Every alderman is bound to attend the court of record held in the borough, although five are sufficient to constitute a court. The only question then is, as to the course to be pursued to enforce the residence of absentees. This can only

(*a*) Cowp. 530. (*b*) Carth. 227. (*c*) 4 Mod. 33. Holt. 435, S. C.

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be done by mandamus. It is a mistake to suppose that this is a case of the first impression. In *Rex* v. *Truro* the rule for a mandamus was made absolute, although the matter was not carried farther. That case was, however, much weaker than this, for there the burgess actually resided just out of the town; but here, the aldermen in question live in different parts of the country, some in *London*, and one is actually out of the kingdom. But before the case of *Rex* v. *Truro*, it was said by *Ashurst*, J. in *Rex* v. *Heaven* (a), that "when a corporator neglects the duties of his office, the corporation should first take cognizance of it, and deprive him, and then it may be properly brought before this Court. And there is no inconvenience in this mode of proceeding; for if any persons find themselves injured by the non-residence of a corporator, and the corporation refuse to interfere and to do their duty, such persons may apply to this Court for a mandamus, directed to the corporation, to enforce a performance of their duty." That case shews, that a quo warranto information will not lie until the aldermen have been removed; and therefore the only mode of proceeding is by mandamus in the terms of the present rule. It is of great importance to the town of *Portsmouth* that the residence of the aldermen should be enforced. This application is connected with the administration of public justice, and stands upon a very different footing from the case where the object is to enforce the performance of a mere ministerial duty. At common law it is the bounden duty of an alderman to reside in the place of which he is a magistrate; and admitting that residence is not required by the express terms of the charter, still it is a duty arising by necessary implication. Here there has been default in persons standing in the situation of public officers, and therefore, according to the principle laid down in *Bull. N. P.* 199. and 3 *Black. Com.* 264. the mandamus in such case is a writ of right to which the subject is entitled. In

(a) 2 T. R. 772.

Reg. v. *Truebody* (*a*), *Rex* v. *The Mayor of Shrewsbury* (*b*), *Rex* v. *The Corporation of Leicester* (*c*), and *Rex* v. *Ponsonby* (*d*), non-residence was considered such a breach of duty in a corporator, as to justify his amotion. Sufficient inconvenience has already been pointed out to warrant the interposition of the Court; and considering the importance of the case, as it affects the due government of every corporation in the kingdom, the Court will at least require the mayor and aldermen to meet for the purpose of considering the propriety of exercising the power of amotion with which they are vested.

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ABBOTT, C. J.—Applications like the present have not been made to the Court until very recently. They have probably grown out of the dictum of *Ashurst*, J. in *Rex* v. *Heaven*. What that learned Judge says is, "If any persons find themselves injured by the non-residence of a corporator, and the corporation refuse to interfere and to do their duty, such persons may apply to this Court for a mandamus, directed to the corporation, to enforce a performance of their duty." The case, therefore, put by the learned Judge to justify such an application, would be, where persons find themselves *injured* by the non-residence. That is the ground there suggested. There is no doubt that a person who accepts an office in a corporation, thereby tacitly engages to take upon himself the duty of giving such attention to the office as the public convenience may require; and where the public convenience requires it, residence, by the common law, is a part of his duty. But if we yield too readily to applications of this nature, we may expect much litigation and serious inconvenience to ensue. Unless we make the convenience or inconvenience resulting to the public from non-residence of corporate officers, the ground of inquiry and rule of our decision, it will lead to an infinity of applications to the governing

(*a*) 2 Ld. Raym. 1275.
(*b*) Cas. temp. Hard. 147.
(*c*) 4 Burr. 2087.
(*d*) 1 Ves. jun. 1.

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power of corporations to remove members of the select body, no matter how large the whole number may be. It seems to me, that we ought not to yield to an application of this nature, unless we saw that there was a *serious* inconvenience sustained, which required this Court to interfere and put the corporation in motion. Now, from the affidavits before the Court, it does not appear to me that there is that serious inconvenience which should call upon the Court to interfere. The non-residence of some of the aldermen rather casts a burthen upon the others, than produces inconvenience to the inhabitants at large, because it compels the few who are resident to be more active in the discharge of the duty of their office, than if there were others to share it with them. It does not appear that those who are resident think the presence of their brethren necessary; and this application is not made by them from any wish that more of their brethren should come to reside within the borough. As to those aldermen who are by the charter required to discharge the duties of a justice of peace, it appears that four are constantly resident within the town, and that the fifth resides at no great distance from it; and therefore, as no delay of justice can arise from the absence of the other aldermen, it appears to me that, considering the very great inconvenience, and the quantity of litigation that may ensue, we ought not to interpose in the manner now required. Nothing but strong evidence of some serious inconvenience and injury sustained by the corporation for want of the residence of its members, can justify such an application. No case of that kind is made out; and as the resident members, who take upon themselves the whole of the duty, do not think it necessary to require the assistance of their brethren, I see no reason for our interposition.

Holroyd, J. (*a*)—I entirely concur with my Lord Chief Justice. Without questioning the propriety of what is said

(*a*) *Bayley*, J. and *Littledale*, J. were not in Court during the discussion.

by Mr. Justice *Ashurst* in *Rex* v. *Heaven*, it appears to me that there is not any injury pointed out by the affidavits in this case which has been sustained in consequence of the non-residence of the persons against whom this motion is directed. There has been no want of attendance on the part of those on whom the duty of a justice of the peace is cast. No complaint is made against them, and therefore there is no pretence for saying that public justice has been delayed, or that any inhabitants of the borough have been prejudiced. If the present application were to be granted, it would entitle any inhabitant, upon the temporary non-residence of an alderman, to insist upon his amotion from office, no matter how urgent the reason might be for such temporary absence. Now, according to one of the cases in *Burrows*'s Reports (*a*), Lord *Mansfield* says, it must be a permanent absence which is to work the forfeiture of office. If, indeed, the non-residence leads to neglect of duty, and by that neglect of duty any person is injured in any of the franchises which are given him by the charter, and such a mischief is clearly shewn, it would not only be the right, but the duty of the Court, to grant the mandamus; but it is not every temporary absence which would justify a mandamus to the mayor, to call a meeting for the purpose of considering the propriety of removing the absentee. But even before such a step could be taken, notice must be given to the non-resident to come in and defend himself; and he may shew a good ground for his non-residence, although an injury has been sustained by his absence, before he can be removed. I think the motion must lay its foundation in some injury actually sustained; or it must be shewn that some person has been deprived of some right under the charter in consequence of the non-residence; and, until that is done, the Court ought not to interfere.

Rule discharged, but without costs.

(*a*) *Rex The* v. *Corporation of Leicester*, 4 Burr. 2089.

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Tuesday, July 6.

NESTOR *v.* NEWCOME, and another.

After issue joined, and notice of trial given in action against a magistrate for an act done in his magisterial capacity, he may withdraw his plea, pay money into Court, and plead de novo.

THIS was an action for an alleged trespass in the plaintiff's dwelling-house at *Ridge* in the county of *Hertford*. The first named defendant, a magistrate, pleaded first, the general issue, and second, leave and license. The other defendant, being a servant, pleaded that he acted under his master's orders. After issue joined, and the paper books made up, and notice of trial given for the next *Hertfordshire* assizes, *Brodrick*, on a former day, obtained a rule calling on the plaintiff to shew cause, why the defendant *Nestor* should not be at liberty to withdraw his pleas, pay money into Court under the statute 24 *Geo.* 2. c. 44. s. 4. by way of amends, and plead the general issue de novo.

Chitty shewed cause. It is a general rule, that *after issue* joined, money cannot be paid into Court. But the language of the statute 24 *Geo.* 2. c. 44. s. 4. is decisive. By that section of the statute, it was enacted that if the magistrate neglected to tender amends before action brought, he might, by leave of the Court, *at any time before issue joined*, pay into Court such sum as he should think fit. Without this statute, the defendant could not pay money into Court at all; and the Court will not extend a privilege, which of itself, is of very considerable latitude. But the defendant does not, in the rule now moved for, specify the sum he proposes to tender. He may tender sixpence, or some trifling sum which is no compensation to the plaintiff. At all events, he is too late after issue joined, and notice of trial given.

Brodrick, contrà. There is no general rule applicable to cases of this description. Each case must depend upon its own particular merits, and the Court, when applied to, will modify the rule as to them seems fit and proper. The

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case of *Devaynes* v. *Boys* (*a*) is an express authority for this application. There the C. P. held upon the statute of amends that, in an action against a magistrate, the *defendant after issue joined*, may move to withdraw the general issue, pay money into Court, and plead de novo. The point was there brought under the express notice of the Court. There is no distinction between the case of a magistrate and any other person; and in ordinary cases the Court will, upon terms, allow a defendant to pay money into Court after issue joined, and even after the granting of a new trial (*b*).

ABBOTT, C. J.—The case in the Common Pleas is decisive. I certainly know of no general rule which says that, after issue joined, a defendant will not be allowed to bring money into Court. This question, however, arises upon the construction of the statute of amends, and it seems to have been expressly decided in *Devaynes* v. *Boys*. By giving the defendant leave to pay money into Court, the plaintiff will not be prevented from going on with his action, and taking the opinion of the jury, whether the sum tendered is a sufficient compensation for the alleged trespass. The rule must specify the sum paid in, and must express that it is paid in with the leave of the Court. The officer of the Court will draw up the rule in the proper form.

HOLROYD, J. (*c*), and LITTLEDALE, J., concurred.

Rule absolute.

(*a*) 7 Taunt. 33. 2 Marsh. 35. S. C.
(*b*) See Tidd, 8th. ed. 671, 2. 2 Stra. 1271. Barnes, 289. 362. 2 Archbold.Prac. 152. 182.
(*c*) *Bayley*, J. was in the Bail Court.

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The KING v. The Justices of KING'S LYNN.

Where the inhabitants of a *town* not within a *hundred*, had incurred costs in defending actions brought on 57 *G.* 3. c. 19. s. 38, for damages done by riotous assemblies: Held, that mandamus would not lie to two justices of the town, to make and levy a rate for paying the costs.

SCARLETT had obtained a rule calling upon two justices of *King's Lynn*, in the county of *Norfolk*, to shew cause why a writ of mandamus should not issue to them, commanding them to cause a taxation to be made and levied of the inhabitants, for paying the costs of defending certain actions brought on the statute 57 *Geo.* 3. c. 19. s. 38. against two of the inhabitants for the recovery of damages alleged to have been sustained by the plaintiffs in those actions, in consequence of certain riotous assemblies of persons within the borough (*a*). The affidavit upon which the rule was granted, stated that *King's Lynn* is a town, *not within any hundred*, and that the costs incurred by the applicants in defending the actions in question, amounted to 111*l.*; and that upon application being made to two justices of the town to levy a rate for the purpose of reimbursing the applicants, the justices declined interfering, on the ground that they had not authority to make a rate for that purpose.

Nolan and *Tindal* shewed cause and objected, first, that there was no provision made by any statute, authorising a rate for the purpose of reimbursing the inhabitants of a *town*, not within *a hundred*, for expenses incurred by them in defending actions brought on the 57 *Geo.* 3. c. 19. s.38; and second, that supposing this case to be provided for, the only mode of relief was by applying to the justices assembled in quarter-sessions. As to the first objection, it is manifest that the 8 *Geo.* 2. c. 16, and the 22 *Geo.* 2. c. 46. s. 34, which are the only statutes which provide the mode of recovering the *costs of defending actions* against inhabitants, are confined solely to *hundreds*, and make no mention whatever of the inhabitants of *towns*, against whom actions may be brought. Then secondly, supposing the

(*a*) Vide *Allen* v. *Ayre*, ante, vol. iii. 96.

1 *Geo.* 1. st. 2. c. 5. s. 6, should be relied upon on the other side, still it will be found that that statute makes no provision whatever as to the *costs* of *defending* actions brought against inhabitants, it merely provides a mode of reimbursing the defendants, on whom the *damages* recovered by the plaintiff have been levied; but assuming that the language of that statute is comprehensive enough to include costs as well as damages, still, in the case of a *town*, the application to tax and levy the amount should be made to the justices assembled in quarter-sessions, and not to two magistrates out of sessions. Here the application for relief has been made to two justices only, and therefore this rule cannot be supported. It is an established rule, that statutes giving costs are to be construed with strictness. *Dibben* v. *Cooke* (*a*), *Ingle* v. *Wordsworth* (*b*), *Coxe* v. *Bowles* (*c*), and *Rex* v. *Glastonby* (*d*).

Scarlett, *Pryme*, and *Parke*, in support of the rule. The question must turn upon the construction which is to be put upon the 34th section of the 22 *Geo.* 2. c. 46. by which it is enacted, that the justices are, in the manner directed by the statute of hue and cry (8 *Geo.* 2. c. 16.), to cause a taxation to be made, levied, and collected, for raising and paying as well the costs and damages recovered by the plaintiff, as also all such just and necessary expenses as any inhabitant or inhabitants of the *hundred* shall have been at in defending any such action. Now although the word *town* is not here mentioned, still it must necessarily be included in the larger word *hundred*. But a town may, for the purpose of the present case, be considered as itself a hundred. That statute evidently contemplated the extension of the remedy thus provided, to all districts or places in which the inhabitants may have been compelled, by process of law, to make compensation to private individuals. A town is equally within the mischief provided for, and

(*a*) 2 Stra. 1005.
(*b*) 3 Burr. 1284.
(*c*) 1 Salk. 205.
(*d*) Cas. temp. Hard. 355.

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there can be no sensible reason for excluding the inhabitants of a town from the remedy, merely because the town happens not to be within a defined district called a hundred. This statute ought to receive a liberal construction, it being in fact a remedial statute, as the riot act, 1 *Geo.* 1. st. 2. c. 5. was in *Ratcliffe* v. *Eden* (*a*) held to be. If a town be within the mischief contemplated by the statute, surely it ought to be within the remedy, although not mentioned eo nomine. In order to give effect to the obvious intention of the legislature, the statutes 8 *Geo.* 2. c. 16. and 22 *Geo.* 2. c. 46. must be incorporated, or at least construed in pari materiâ with the 57 *Geo.* 3. c. 19. s. 38. by which a remedy is given against the inhabitants of any city or *town* for damage done by riotous or tumultuous assemblies, " if such city or town be a county of itself, *or is not within any hundred*, or otherwise, the inhabitants of the hundred in which such damage shall be done," &c. Unless a liberal construction is put upon these statutes, the inhabitants of towns will be deprived of that remedy which was evidently intended to be given to all divisions of counties, whether hundreds, or towns not within a hundred (*b*).

The Court took time to advise upon the case, and judgment was now delivered by

Abbott, C. J.—This was a motion for a writ of mandamus to be directed to two justices of the borough of *King's Lynn*, commanding them to make a rate, and levy a sum of money, for the purpose of reimbursing two inhabitants of the town, the costs incurred by them in defending actions brought against them on the statute 57 *Geo.* 3. c. 19. s. 38. for recovering damages occasioned by riotous assemblies. It appears that *King's Lynn* is a town corporate, that it is not within any hundred, and that it is not a county of itself. On shewing cause against the rule nisi for a mandamus, two objections were made; first, that this case

(*a*) Cowp. 485. See Doug. 699.

(*b*) See 2 Inst. 110. & 150.

was not in any manner provided for by any statute; and second, that if it was in any manner provided for, the mode of relief was by application to the quarter-sessions, and not to two justices out of sessions. The 38th section of the statute 57 *Geo.* 3. c. 19. on which the actions were brought, is as follows: " And be it further enacted, that in every case where any house, shop, or other building whatever, or any part thereof, shall be destroyed, or shall be in any manner damaged or injured, or where any fixtures thereto attached, or any furniture, goods, or commodities whatever, which shall be therein, shall be destroyed, taken away, or damaged by the act or acts of any riotous or tumultuous assembly of persons, or by the act or acts of any person or persons engaged in or making part of such riotous or tumultuous assembly, the inhabitants of the city or town in which such house, shop, or buildings shall be situate, if such city or town be a county of itself, or is not within any hundred, or otherwise the inhabitants of the hundred in which such damage shall be done, shall be liable to yield full compensation in damages to the person or persons injured or damnified by such destruction, taking away, or damage; and such damages shall and may be demanded, sued for and recovered by the same means, and under the same provisions, as are provided in and by the 1 *Geo.* 1. st. 2. c. 5. with respect to persons injured and damnified by the demolishing or pulling down of any dwelling-house, by persons unlawfully, riotously, and tumultuously assembled." It is to be remarked, that this statute speaks only of the *damage* sustained by the party injured, and is silent as to the *costs of a defence*. The statute 1 *Geo.* 1. st. 2. c. 5. also mentions only the *damages* to be recovered by the plaintiff, and directs that at the plaintiff's request, made to the justices of the town, *at any quarter-sessions*, the damages shall be raised and levied on the inhabitants of the town, and paid to the plaintiff in the manner directed by the 27 *Eliz.* for reimbursing the persons on whom money recovered against any hundred, by any

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party robbed shall be levied. The 27 *Eliz.* c. 13. ss. 4 & 5. provides only for relief of the particular inhabitants of a hundred upon whom the damages recovered against the hundred may have been levied, and directs that upon complaint made by the parties so charged, two justices of the county shall tax the hundred. This statute, therefore, has made no provision for the *costs* of the *defence*. It is confined to *hundreds*, and though it gives the power to two justices, and is referred to by the 1 *Geo.* 1. st. 2. c. 5. yet by the express words of that statute, the power is given to the *quarter-sessions* in the case of *a town*. So that unless there be some other statute that can be embodied into and made a part of the legislative provision of the 57 *Geo.* 3. there is clearly no foundation for this application for a mandamus. It was argued in support of the motion that the statutes 8 *Geo.* 2. c. 16. and 22 *Geo.* 2. c. 46. are so to be considered. Now with respect to the 8 *Geo.* 2. c. 16. that relates only to the statutes of hue and cry. It directs that in actions against the hundred, the process shall be served on the high constable, who is to defend, and if the plaintiff obtains judgment, the sheriff is to produce the writ of execution to *two justices* of the county, who are to make an assessment as directed by the 27 *Eliz.* c. 13. and are to include therein, in addition to the damages and costs recovered by the plaintiff, the necessary expenses of the high constable in defending the action. This is the first time that any act has mentioned or made provision for the recovery of *costs* in *defending* the action. The 22 *Geo.* 2. c. 46. s. 34. extends the remedy given by the statute 8 *Geo.* 2. (which, as already observed, is confined to the statutes of hue and cry,) to all causes or actions against the inhabitants of any *hundred*, and directs the sheriff to produce the writ of execution to two justices of the peace of the county as directed by the statute 8 *Geo.* 2. and thereupon requires the justices to raise by taxation as well the costs and damages recovered, as the expenses incurred by any inhabitant *in defending* the action. These are the only statutes upon the

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subject, and of these the only one mentioning the inhabitants of a *town* is the 1 *Geo.* 1. st. 2. c. 5. and this makes a distinction between the inhabitants of a hundred and those of a town; and as to the first directs the assessment to be according to the 27 *Eliz.* namely, by two justices of the county; as to the latter, that is, the inhabitants of a town, it gives the authority to the justices at quarter-sessions. If, therefore, we were to grant the writ in the present case, we should be granting relief for costs to a defendant in a case in which no statute has, in terms, given such relief, and should also be ordering the relief to be administered by two justices, when the only statute providing for the case of a town, has given the power of relieving to the justices assembled at quarter-sessions. To do this would be ordaining and making a new law, which we have as little inclination as authority to do. The rule, therefore, must be discharged.

Rule discharged.

S. WRIGHT and another, Assignees of H. GOLDING, a Bankrupt, *v.* J. LAING.

Tuesday, July 6.

A. gave to *B.* three bills of exchange, as a security for money lent, and usurious interest thereon. Before the bills became due, *B.* advanced to *A.* a further sum of money upon his general credit and account, by means of which *A.* was enabled to pay the bills: Held, that by such payment of the bills the usurious interest was also paid.

B. had two demands against *A.*, one upon a legal contract for goods sold, the other upon an usurious contract for money lent. *A.* made a payment, which was not at the time specifically appropriated by either party to either demand: Held, that the law would afterwards appropriate that payment to the demand for goods sold, as arising out of a contract recognised by the law, and not to the demand for money lent, which arose out of an unlawful contract.

DEBT, upon the statute 12 Ann. st. 2. c. 16. to recover penalties in respect of an usurious transaction alleged to have taken place between the bankrupt and the defendant. The declaration contained several counts, but the points for consideration arose upon the 17th, which stated— That defendant, on the 8th *November*, 1820, upon a certain corrupt and illegal contract made and entered into,

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on 25th *April*, 1820, by and between defendant and the bankrupt, received and took of and from the bankrupt the sum of 22*l*. 10*s*. by way of corrupt bargain and loan for defendant's forbearing and giving day of payment to the bankrupt of the sum of 300*l*. lent and advanced on 25th *April*, 1820, by defendant to the bankrupt, from the time of lending and advancing the same, until 28th *October*, 1820, on which day the sum of 2*l*. 10*s*. was paid, and for forbearing, &c. the sum of 297*l*. 10*s*. residue of the said sum of 300*l*., until 1st *November*, 1820, when the sum of 158*l*. was paid; and for forbearing, &c. the sum of 139*l*. 10*s*. the then residue of the said sum of 300*l*., until 8th *November*, 1820, when that residue was paid, such sum of 22*l*. 10*s*., exceeding the rate of 5*l*. per cent. per annum, &c. contrary to the form of the statute, &c. At the trial before *Abbott*, C. J. at the *London* Adjourned Sittings after last *Michaelmas* Term, the plaintiffs rested their case upon the evidence of the bankrupt, who stated the following facts:— On the 25th of *April*, 1820, the defendant, at the request of the bankrupt, advanced him a sum of 300*l*. to be repaid at the end of six months, with 15*l*. per cent. interest. About the same time the bankrupt bought of the defendant a quantity of hops for the price of 148*l*. 11*s*. 1*d*., and as a security for the loan of money, the interest thereon, and the price of the hops, the bankrupt gave the defendant three bills of exchange, which were thus described in the account afterwards furnished by the defendant.

Dr.				*Golding.*			Cr.
Money lent 25th April	£300	0	0	By bill due 28th Oct.	£150	10	1
Interest	22	10		Do.— due 1st Nov.	158	0	0
Hops sold	148	11		Do.— due 8th Nov.	162	0	0
					470	10	1
				Balance due	0	11	0
	£471	1	1		£471	1	1

About a week after the money was advanced, the bankrupt, paid the defendant the balance of 11*s*. The bills were all

paid as they fell due. On the 30th of *October*, the defendant advanced to the bankrupt a further sum of 250*l.* with which the bills were in fact paid, but at the time of that advance no agreement was made that the money should be appropriated specifically to the payment of either of the three bills, which had been given to secure the alleged usurious loan, and which at that time were not yet due. Upon this evidence, it was argued for the defendant, that neither the original loan, nor the usurious interest, had ever, in fact, been paid, because, though the three bills had been paid when due, the bankrupt had been enabled to pay them, or at least the two which fell due on the 1st and 8th of *November*, out of funds supplied to him by the defendant, consequently the bankrupt had never himself paid those bills, and the usurious contract had never been carried into effect. The learned judge thought that if the advance on the 30th of *October* by the defendant to the bankrupt, was made upon the general account and credit of the bankrupt, and was not appropriated specifically to the payment of any of the bills, and though that sum remained unpaid to the defendant, still the bills must be taken to have been paid by the bankrupt. On the other hand, he was of opinion, that if the bills had been renewed when they fell due, or money had been advanced by the defendant to the bankrupt for the specific purpose of taking them up, which money had remained unpaid to the defendant, then the account between them would have continued open, and the usurious interest could not have been taken to have been paid. His Lordship, therefore, directed the jury, if they thought, upon the evidence, that the money advanced on the 30th of *October* was advanced upon the general account and credit of the bankrupt, to find for the plaintiff; but if they thought that it was, at the time of the advance, appropriated specifically to the payment of the bills, to find for the defendant. The jury found for the plaintiffs for 900*l.*, and a verdict was taken for that sum on the 17th count only.

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Scarlett, in *Hilary* Term last, obtained a rule nisi for a new trial upon the objection raised at the trial, and also upon the ground that the 17th count was not supported by the evidence, and against that rule

Marryat and *Chitty*, on a former day in this term, shewed cause. The count upon which the verdict was taken states the facts of the case according to their legal operation, and is framed conformably with the appropriation which the law would make of the payments made in respect of the bills of exchange. The learned judge left it to the jury, as a question of fact, to say, whether the subsequent loan of the 30th of *October* had been made generally upon the credit of the bankrupt and without reference to the former usurious bargain, or had been appropriated specifically to the purpose of taking up the bills, and they found in the affirmative of the first proposition. The law, therefore, will appropriate the bills to the payment of the original loan and the interest, and will hold that these two separate transactions cannot be so mixed up, as to furnish the defendant with a protection from those penalties which he has by the original contract incurred.

Scarlett and *F. Pollock*, contrà. The different counts of this declaration assign different appropriations of the bills of exchange as they respectively fell due, but no one of them sets out the facts of the transaction consistently either with their actual or legal operation. In point of fact the bills were given generally as a security both for the goods sold and the money lent, with the interest; when they fell due, there was nothing to justify their application to the one more than to the other: consequently, every count, which assigns any specific appropriation to them, as is the case with that in question, mis-states the facts, and is unsupported by the evidence. That count, in common with the rest, severs the transaction into distinct parts, and gives a specific appropriation to the bills, which it is

quite clear, from the testimony of the bankrupt, the parties neither had done, nor had intended to do. If the declaration had stated the contract to be, that the bills should be given generally in respect of the whole transaction, not specifying precisely the periods for which the several sums were forborne, but simply the times when the bills were given, and when they were paid, the statement would have been consistent with the evidence, and would have supported a verdict finding that the usurious interest had been paid. That, however, is not the case, and, therefore, the 17th is, equally with the other counts, inconsistent with the facts proved. With respect to the second point, it is perfectly clear that the original debt owing to the defendant was never paid, because the bills were taken up, almost exclusively by means of funds supplied to the bankrupt by the defendant himself: it is, therefore, impossible to say that he ever received payment, either of the principal money originally advanced by him, or of the illegal interest intended to be paid upon it.

PER CURIAM.—The jury having found, as a matter of fact, that the second advance was made generally upon the credit and on account of the bankrupt, without any specific appropriation of the money to the taking up of the bills, there is no question as to the payment of the usurious interest; because the payment of the bills must be taken to have been made in respect of the original loan, and the interest agreed to be paid upon it. The Court will take time to consider the second point.

Judgment was now delivered by

ABBOTT, C. J.—This was an action for penalties on the statute of usury. The facts of this case have been very recently before the Court. It arose on the sale of some hops, and on a loan of money. It was not disputed that the loan was made for usurious interest, but it was con-

tended on the part of the defendant, that all the bills of exchange which were given by *Golding* the borrower to the defendant, as a security for this sale and loan, together with the interest, had not in effect been paid by *Golding;* and even if they had been, still that every one of the counts in the declaration, of which there were no less than twenty, was so imperfectly framed, as to prevent the plaintiffs from availing themselves, in this action, of the illegality of the transaction. We think the evidence plainly shews that all the bills had been paid by the borrower, and so the jury found; and therefore, it only remains for us to inquire whether there is any one of the counts that will sustain the verdict. Now, by the 17th count it would appear, that the amount of the first bill of exchange was more than would cover the price of the hops sold by the defendant to *Golding;* so much of it as covered the price of the hops was appropriated to that purpose, and the residue of that bill, and the whole of the two bills subsequently falling due, was appropriated to the payment of the money lent and of the usurious interest. This is the statement in that count. In point of fact, none of the payments were appropriated to any particular purpose by either party, at the time when the payments were made; but if the law ought now to make such an appropriation of those payments as the pleader has supposed in this count, to have been made originally, the count will be supported by the evidence: otherwise, it will not. If the parties did not make such an appropriation at the time, we think the law ought now to make it for them. For the sake of rendering this transaction more simple and intelligible, let us suppose a contract made for the sale of goods, at the price of 100*l.*, payable by a bill at six months' date; and as soon as this contract is made, another and distinct contract to be made for the loan of 93*l.* for the same period of six months, in consideration of receiving 7*l.* as interest for the loan; and that the next day two bills are drawn for 100*l.* each, falling due within four or five days of each other, and

within five or six days of the day on which the contracts were made, without any thing said or done to denote the appropriation of either of the two bills to either of the two contracts. Let us then suppose, that the first bill is paid when due, without any appropriation of the amount by either of the parties; that the other bill remains unpaid; and that in this state of things an action is brought by the seller of the goods, who is also the lender of the money, for goods sold and for money lent, without taking notice of the bills; or that he brings an action upon the unpaid bill. Would not the Court, for the furtherance of justice, feel itself bound at the trial to say, that the price of the goods had been paid by the discharge of the first bill, and that the plaintiff could not recover, either on a count for money lent or on the second bill, by reason of the illegality of the contract? We are of opinion that the Court must say this in the case that I have put. The present decision can work no injustice, for such an appropriation as we thereby make, will leave the party only in the situation in which he had placed himself. So, in the case which I have put, of the payment of one bill and non-payment of the other, if an action were brought for penalties on the statute of usury, the same principle of law would operate in protection of the defendant, by appropriating the payment of the first bill to the legal demand for the goods sold, and not allowing the plaintiff in that action to appropriate it to the illegal demand, the loan and interest upon it, although the two demands might be the same in amount; for the lender might, at the proper time, reject the illegal contract, and decline accepting the full amount of the bill, which the law would allow him the opportunity of doing, in order to rescue him from the charge of being a receiver of usurious interest, at least without distinct proof that he had not only contracted to receive, but had in fact received, such interest. Then if the law would make such an appropriation of the payments in the two instances which I have put, in the first against the lender, to prevent him from enforcing an illegal con-

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tract, and in the second, on behalf of the lender, to protect him from the penalties consequent upon an illegal contract; it seems to follow as a necessary consequence, that the law ought to make a similar appropriation in the case now before the Court, and that the pleader, who is always at liberty to state the facts according to their legal operation, was fully warranted in thus framing this count; and that the count, so framed, is supported by the evidence. By such a decision, the Court are in substance saying no more than this: that where a party has two claims, one arising out of a contract recognised by the law, and another arising out of a transaction forbidden by the law, and an unappropriated payment is made to him, the law will appropriate that payment to that claim which is conformable with, and not to that which is in violation of, the law. This being our opinion, the rule obtained for a new trial must be discharged.

Rule discharged.

Tuesday, July 6.

The KING v. The Right Hon. C. A. PELHAM, Lord YARBOROUGH.

Where the lord of a manor acquired a piece of land which had been formed gradually by ooze and soil deposited by the sea, upon the extremity of his demesne lands, and it appeared that the increase could not be observed when actually going on, although a visible increase took place every year, and in the course of fifty years a large piece of land had been thus formed; and upon an inquest finding that the land had been *left* by the sea, and on issue taken, upon a traverse to that finding, the verdict was for the defendant:—Held, that the Crown was not entitled to judgment.

BY an inquisition (the record of which was transmitted from the Petty-bag Office into this Court), taken at *Cleathorps* in the county of *Lincoln*, on the 12th *November*, 1818, it was among other things found, that there is a certain piece of land, being salt marsh, lying near or adjoining to the parish or lordship of *North Cotes*, in the said county, which piece of land is bounded towards the south and south-west by the sea-wall or sea-bank of certain lands in the lordship of *Titney*, and on all other parts by the sea, and contains by estimation 453 acres or thereabouts, and is of the

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annual value of four shillings an acre, and was in times past covered with the waters of the sea, but is now, and has been for several years past, *left*, and is not covered with water, except at high tides, when the sea doth flow to the said sea-walls or sea-banks; which said piece of land, from the time of such *dereliction*, hitherto has been, and still is, unoccupied; but the herbage thereof has been, from time to time, eaten and consumed by the cattle and sheep belonging to divers tenants or occupiers of land situate within the said parish or lordship of *North Cotes*. The inquisition then stated, that the said piece of land, together with other lands therein mentioned, had been seized by the commissioners for crown lands, into the hands of the crown. The defendant then traversed the inquisition and return, (of which he craved oyer,) and after admitting the boundaries, &c. of the land in question, averred, "that from time whereof the memory of man runneth not to the contrary, there hath been, and still is, a certain ancient manor called or known by the name of the manor of *North Thoresby cum North Cotes*, situate within the parish of *North Cotes* aforesaid, in the said county of *Lincoln*; and that defendant, long before the respective days of issuing the commission and finding the inquisition, to wit, on &c. was seised in his demesne as of fee, of and in the manor of *North Thoresby cum North Cotes*, and the demesne lands thereof, and that the same piece of land heretofore, to wit, on the 1st *January*, 1300, and on divers other days and times between that day and the day of the finding the inquisition, by the slow, gradual, and imperceptible projection, alluvion, subsidence, and accretion of ooze, soil and sand, and matter, being slowly, gradually, and by imperceptible increase in long time, cast up, deposited, and settled by and from the flux and reflux of the tide and waves of the sea in, upon, and against the outside and extremity of the demesne lands of the same manor, hath been formed, and hath settled, grown, and accrued upon and against and unto the said demesne lands of the same manor, and the same, and every portion thereof, when

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and as the same hath so there been formed, settled, grown, and accrued, hath thereupon and thereby, at those times respectively, in that behalf above mentioned, forthwith become and been, and from the same several times respectively hath and have continued to be, and still are and is, part and parcel of the said demesne lands of the same manor, and the several owners and proprietors of the same manor for the time being, during all the time aforesaid, until the time of the seisin of the defendant as aforesaid; and defendant, during the time he hath been so as aforesaid seised of and in the said manor, from the time of the formation and accretion of the same piece of land, and every part thereof respectively, continually, until the time of the finding of the inquisition, respectively were and was seised in their and his demesne as of fee, of and in the same piece of land, and every part thereof, when and as the same hath been so formed and accrued as aforesaid, as and for part and parcel of the demesne lands of the same manor. Without this, that the said piece of land in the plea mentioned, and in the inquisition last above mentioned, or any part or parcel thereof, was, and now is, by the sea left in manner and form as in the inquisition is above supposed and found. A replication by the Attorney-General traversed part of the inducement to the defendant's traverse, in the following words: "Without this, that the said piece of land in the inquisition lastly mentioned, being the piece of land before described at the times in the said plea mentioned, by the slow, gradual, and imperceptible projection, alluvion, subsidence, and accretion of ooze, soil, sand, and other matter, being slowly, gradually, and by imperceptible increase in long time, cast up, deposited, and settled by and from the flux and reflux of the tide and waves of the sea, in, upon, and against the outside and extremity of the demesne land of the same manor, hath been formed, and hath settled, grown, and accrued upon and against and unto the said demesne lands of the manor, in manner and form as the defendant hath above in his plea in that behalf alleged. Re-

joinder by defendant took issue upon this fact. Replication took issue on defendant's traverse that the said piece of land in the plea of defendant mentioned, was, and now is, by the sea left, in manner and form as in the inquisition is above supposed and found." Upon this replication issue was also joined by the defendant. Upon the trial of these issues at the last *Derbyshire* Assizes, before *Park*, J. a verdict was found for the defendant. In *Easter* Term a rule was obtained by *Copley*, A. G. calling upon the defendant to shew cause why there should not be a new trial granted; but at the suggestion of the Court, the facts proved at the trial were afterwards stated in a special case for the opinion of the Court. The case stated was as follows:—

The land in question consists of 450 acres of salt marsh, called *fittees*, being the land covered with herbage, which, at the time of taking the inquisition set forth in the pleadings, lay between the sea-wall and the sea, opposite to *North Cotes* in the county of *Lincoln*. It was proved that this land had been formed in the course of time by means of ooze, warp, silt, sludge, and soil, carried down by the river *Humber*, and deposited and cast up by the flux and reflux of the sea, upon and against the adjacent land, whereby the land has been enlarged and increased, and the sea has receded. The matter thus deposited is at first soft and sludgy, but in the course of five or six years grows firm, and then produces herbage. With respect to the degree or rate of growth and increase of the land, the evidence produced on the part of the crown was as follows: The first witness proved, that the sea had receded in parts 140 or 150 yards within 26 or 27 years; and that within the last four years he could see that it had receded much in parts, but could not say how much; and in parts he believed that it had not receded at all. The alteration, he said, had been slow and gradual, and he could not perceive the growth as it went on, though he could see there had been an increase in 26 or 27 years of 140 or 150 yards, and that it had cer-

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tainly receded since he measured the land the year before. The second witness proved, that in 15 years there had been an increase of the fittees on the outside of the sea-wall in some parts from 100 to 150 yards; that it grows a little from year to year; that within the last five years there had been a visible increase in some parts during that period of from 30 to 50 yards; and that the gradual increase is not perceptible to the eye at the moment. The third witness said there had been some small increase in every year; and the fourth witness said, the swarth increased every year very gradually, and that perhaps it had gathered a quarter of a mile in breadth in some places within his recollection, or during the last 54 or 55 years; and in some places it had gathered nothing. It was proved that the ground between the sea-wall above mentioned, and another sea-wall still more remote from the sea, appeared to have been covered over formerly with sea-water. If, upon these facts, the Court should be of opinion that judgment ought to be given for the Crown, the verdict obtained by the defendant is to be set aside and a new trial had; but if the Court should be of opinion that the defendant is entitled to judgment, then judgment is to be entered for the defendant upon the verdict.

Goulburn, for the Crown. The principles of law by which the judgment of the Court will be directed as to the King's title to marine accretions, are so plainly and distinctly set forth by a writer of the greatest authority, that it is unnecessary to refer in detail to other sources, the authorities themselves being all collected and arranged in that writer's work. Lord *Hale*, in his treatise *De Jure Maris*, part 1. c. 4. p. 14. says that "The King hath a title to *maritima incrementa*, or increase of land by the sea; and this is of three kinds, viz. 1. Increase per projectionem vel alluvionem. 2. Increase per relictionem vel desertionem. 3. Per insulæ productionem." Then follows a description of each. In the present case the claim by the

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Crown is in respect of an increase of soil by alluvion, which Lord *Hale* describes in the following terms: "The increase per alluvionem is when the sea, by casting up sand and earth, doth by degrees increase the land, and shut itself out further than the ancient bounds went; and this is usual. The reason why this belongs to the crown is, because, in truth, the soil, wheret here is now dry land, was formerly part of the very fundus maris, and consequently belonged to the king." The principle to be collected from this position, and which is strongly applicable to this case, is, that the ground being the king's when covered with water, cannot cease to be so when the sea has left it. He states that in two places, first, at p. 14, and second, at p. 28. "But," he adds, "indeed, if such alluvion be so insensible, that it cannot be by any means found that the sea was there, idem est non esse et non apparere; the land thus increased belongs as a perquisite to the owner of the land adjacent." After again describing the jus alluvionis in nearly the same words at p. 28, he citest his passage from *Bracton*:(a) "Item quod per alluvionem agro tuo flumen adjecit, jure gentium tibi acquiritur. Est autem alluvio latens incrementum. Et per alluvionem adjici dicitur, quod ita paulatim adjicitur, quòd intelligere non possis quo momento temporis adjiciatur, &c. Si autem non sit latens incrementum, contrarium erit, ut vis fluminis partem aliquam ex tuo prædio detraxit, et vicini prædio appulit, certum est eam tuum permanere," &c.; and then he says, "But *Bracton* follows the civil law in this and some other following places." Shortly afterwards he adds, "This jus alluvionis, as I have before said, is de jure communi by the law of *England* the king's." As to the increase per relictionem, or recess of the sea, he observes, at p. 14, that "This doth de jure communi belong to the king;" for the reason before mentioned, namely, that as the sea is part of the waste or demesne of the crown, that which lies under it belongs to the king, and does not cease to be so by the secession of the water. At pp. 14 and 30, he cites the case of *Rex* v. *Oldsworth* and

(a) Lib. 2. c. 2.

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others, in the Exchequer, which was an information against the defendants for intruding into 300 acres of land which was relictum per mare, and now called *Sutton Marsh*. The defendants pleaded specially, and entitled themselves by prescription to the lands project by the sea; and upon a demurrer it was adjudged against them, "That first, by the prescription or title made to lands project, which is jus alluvionis, no answer is given to the title of information for lands relict, for these were of several natures. Second, it was held, that it lies not in prescription to claim lands relict per mare." That case establishes two propositions; first, that it is necessary to plead specially in order to entitle the subject to land gained by alluvion; and second, that derelict land can only be claimed by custom. In illustration of the latter proposition Lord *Hale* cites, at p. 29, *Rex* v. *The Abbot of Peterborough*, in K. B. *M.* 23 *Edw.* 3. Rot. 26. in which case the abbot pleaded and proved a title to land increased by alluvion, and therefore he had judgment. According to the doctrine of that case, if in the present case a custom had been pleaded, and issue taken upon it, and found for the defendant, it could not be successfully contended that he would not be entitled to the lands in question. Lord *Hale*, in page 28, cites the case of *Rex* v. *The Abbot of Ramsay*, *E.* 43 *Edw.* 3. Rot. 13. *in Scac.* (a) where process went out against the abbot for 60 acres of marsh land, which he had appropriated to himself; and he pleaded that he held the manor of *Brancaster*, situate near the sea, and that there was there a certain marsh sometimes diminished and sometimes increased by the flux and reflux of the sea, and traversed the supposed appropriation; and upon issue joined at nisi prius before one of the barons, a verdict was found for the abbot, and judgment was afterwards given quòd eat sine die, salvo semper jure regis. In observing upon this case Lord *Hale* says, "Though there were a verdict upon this issue, whether appropriavit or not, yet it is plain that the title stood upon that which the abbot alleged by way of increment. And note: Here is no cus-

(a) Cited by Dyer, 326, out of the Book of Ramsay.

tom at all alleged; but it seems he relied upon the common right of his case, as that he suffered the loss so he should enjoy the benefit, even by the bare common law in case of alluvion." Undoubtedly, the subject may be entitled to lands by alluvion if he states upon the record and proves that he has suffered a loss of land in the same place, and then he is to have the benefit when the land increases again by alluvion. But nothing of that kind is proved or stated here; it was attempted, but failed at the trial. In the outset of the case in *Dyer*, a quære is put, " Whether, if the salt water of the sea relinquish a great quantity of the land, it belongs to the prince in virtue of his prerogative, or goes to the owner of the adjacent land as a perquisite?" and in the margin the quære is answered by a note, supposed to have been made by *Treby*, C. J. " Le prince, avera, tout ters *left by or gained from the sea;*" and he refers to a treatise which he has read, giving *Romney* Marsh and *Broomhill* in *Kent* as instances. The remaining mode in which the subject may be entitled to land by alluvion is, when the increase is so insensible that it cannot be by any means found that the sea was there before, and then it is a perquisite to the owner of the land adjacent (*a*). *Callis* (*b*), in his lecture on the statute of sewers, applies the doctrine " de minimis non curat rex," to land so acquired, inasmuch as the quantity cannot perhaps be ascertained, and, therefore, it goes from the crown to the subject, for he says, " And so of petty and unperceivable increasements from the sea, the king gains no property, for de minimis non curat rex." These, therefore, are the only instances necessary to take notice of in which the crown claims title to maritime increments. It is clear that that which was originally part of the very fundus maris, cannot be taken from the crown. The crown is not now claiming any thing to which it was not before entitled; it is merely claiming that which a subject is endeavouring to claim title to without any right which he has pleaded, or can establish upon any known principle of

(*a*) Lord *Hale*, De Jure Maris, 14 & 28. (*b*) 4th Ed. by *Broderip*, 51.

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law. All that is sought in this case is, to adjust the rights of the crown upon the same principle as those of a subject. The fundus maris belongs to the crown, and when the sea recedes from it, still it retains its master. So where land, originally the property of a subject, happens to have been overwhelmed by the incursions of the sea, when the sea recedes, the land again reverts to its original owner. Instances of this kind are put in *Callis*, 47 (*a*). The passage in *Bracton*, lib. 2. c. 2. cited by Lord *Hale*, may be relied upon on the other side, but it will already have been remarked, that Lord *Hale* says, that in that passage, and in many other places, *Bracton* follows the civil law. There are authorities for saying that *Bracton* is not an author entitled to much respect. In *Fitz. Abr. tit. Gard.* pl. 71. the whole Court said that *Bracton* was not held as of any authority. In *Stowell* v. *Zouch* (*b*) and *Ball* v. *Herbert* (*c*), a similar opinion seems to have been expressed of him; but the observation of Lord *Hale* himself upon this passage of *Bracton*, shews that it is not entitled to much weight. At the trial, the passage in 2 *Blac. Com.* 261. was relied upon, but it is obvious that the position there laid down is too loose, because it makes no distinction between increasements by alluvion and by reliction. All the authorities upon this subject constantly make a marked distinction between the increase by projection or alluvion, and reliction or desertion. The result of these authorities is, that increase by alluvion belongs of common right to the king, and nothing can take it from him except one of three things, prescriptive title, custom, or where the alluvion has been so gradual and imperceptible, as to be within the maxim de minimis non curat rex. This case clearly does not come within either of the first two exceptions, for in the first place it cannot be shewn that the sea was never there before; and in the second, no custom has been pleaded and proved; then, lastly, does the case come within the principle de minimis non curat rex? Now, according to the facts found, the whole increase has

(*a*) See Roll. Ab. Prerogative le Roy, 168. pl. 2.
(*b*) 1 Plowd. Com. 357. (*c*) 3 T. R. 263.

been 450 acres, and it went on progressively increasing eight or nine yards in width every year, or three quarters of an inch every day. The increase, was, therefore, perceptible every year. This was clearly not such an imperceptible increase as will take it from the crown. It is perceptible to the eye, and therefore it does not come within the principle just adverted to. The argument on the other side will be carried too far, if it is said that the increase must be perceptible to the eye as it is going on, in order to give it to the crown. That would be a contradiction in terms, because all alluvion must be imperceptible whilst it is going on. The only question for the Court is, whether, from the facts stated, it is or is not clear that this was land which had originally been covered with water, but had been deserted by the sea. It is clear that the fact was so, and therefore the first issue ought to have been found for the crown, on the ground that it had been part of the fundus maris, but ceased to be so. The inquisition in question had merely issued for the purpose of ascertaining whether this land had or had not been covered by the sea. The crown only avers in the second issue that the land was left in the manner stated in the inquisition: and it appearing clearly from the evidence that this was originally parcel of the fundus maris, the crown is, as of common right, entitled to judgment.

S. M. Phillipps, contrà. The word "imperceptible," as used in the first issue, must be understood in its common and ordinary sense. It has no legal or technical meaning different from that which it bears in common use. The sense and meaning of the word must be collected from the context. The issue upon the record is, whether the land in question has been formed, and has settled, grown, and accrued upon and against the demesne lands of the manor, "by the slow, gradual, and imperceptible projection, alluvion, subsidence, and accretion of ooze, soil, sand and matter, being slowly, gradually, and by imperceptible increase in long time cast up, deposited, and settled by and from the flux and reflux of the tide and waves." The

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words "slow, gradual, and imperceptible projection, alluvion, subsidence, and accretion," must necessarily be understood as describing an alluvion so slow and gradual, as not to be perceptible in its operation. In the nature of things, as the accretion is produced by the regular succession of the tides, from day to day, it must be imperceptible to the eye at the time. If then, the deposition of small particles of matter be imperceptible to the eye, so must the increase be imperceptible, although at the end of fifty years, there may have been a considerable accretion, composed of many minute particles which have been gradually cemented. Reading the language of the first issue in the ordinary sense in which the words are used, it is impossible for the jury to have come to any other conclusion than they did, consistently with the evidence. The substance of the evidence is, that the land had been formed in the course of time by means of ooze, warp, silt, sludge and soil, cast up by the flux and reflux of the sea, upon and against the adjacent land, and all the witnesses concurred in stating that the increase had been gradual and imperceptible. So that the language of the issue agrees with the evidence. But without the aid of oral evidence, it is a matter of notoriety that the accretion must have arisen from an imperceptible alluvion in consequence of the local situation of the land in that part of the coast of *Lincolnshire*, which is almost tabular. On that part of the case it is manifest, that the verdict of the jury was rightly found for the defendant. If that be so, then there is an end of the second issue, because the language of that is, that the land was "*left*" by the sea, and became "*derelict*." Now, according to Lord *Hale* and *Callis*, even in the passages cited on the other side, there is a manifest distinction between land formed by alluvion, and derelict land, or land left by the sea; and to each a totally different rule of law is applicable. In pp. 14. 30 and 31 of the treatise *De Jure Maris*, Lord *Hale* defines maritimà incrementa, per alluvionem, et per relictionem as opposed to each other in their very nature. For instance, at p. 30, he says, "now,

as touching the accession of land per recessum maris, or a sudden retreat of the sea, such there have been in many ages. This accession of land by the recess of the sea doth not come under the former title of alluvio, or increase per projectionem." It appears, therefore, most clearly, that land *left* by the sea, and that produced by *alluvion*, are of distinct natures; and if so, then it follows that the jury have also done right in finding the second issue for the defendant. But then it is said on the other side, that the crown is still entitled to judgment, because the defendant does not set out any custom or prescription, on the record, so as to shew that he is entitled to the land in question. In answer to that argument, it is sufficient to say, that land formed in the manner in which the land in question has been formed, that is, during a long course of years, by gradual and imperceptible accretion, belongs as of common right to the subject without any plea of custom or prescription, and does not go to the crown. There are several authorities to this effect. The earliest book upon this subject, is *Dyer*, 326. b. *Brooke's* and *Fitzherbert's* Abridgements, and *Staunford's Prerogativæ Regis* are silent upon it. It is not now to be disputed, that derelict land belongs to the crown; but *Dyer*, C. J., 326, puts it as a doubtful proposition, whether a *great quantity* of land relinquished by the sea shall belong to the king by his prerogative, or to the owner of the adjoining land, as a perquisite. He certainly, however, refers to decisions, and to text writers, in which, in the case of land produced by alluvion, it has been held unnecessary that any customary or prescriptive title should be pleaded. The cases he refers to, are *Rex* v. *The Abbott of Ramsay*, 43 *Ed.* 3., and *Digges* v. *Hammond*, in both of which judgment went against the crown, although no prescriptive or customary title was set out on the record; and these were solemn decisions. According to *Callis*, pp. 50 and 54, the lands in both those cases were produced by alluvion. These then are express authorities in support of the proposition, that, by the common law, land formed by alluvion, in the manner here

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proved, belongs of common right to the subject, without any prescription or custom. The note by *Treby*, C. J., intended to solve *Dyer*, C. J.'s doubt, does not help the argument; for comparing that note with the object to which the allusion is made, it professes too much. "Left by, or gained by," are words inducing a supposition that the chief justice means lands gained from the sea by *artificial means*. If the sea shore belongs to the crown, the public cannot shut out the sea by artificial means. It is clear, that *Treby*, C. J., in making that note, does not mean to include land produced by gradual alluvion, for if he did, that would be in opposition to the two solemn decisions reported immediately afterwards in the text; and it is not likely that he would have propounded any doctrine at variance with those decisions, without remarking upon them. If what he says was meant to explain C. J. *Dyer's* doubt, it applies to derelict land only. From 2 *Roll. Abr.* 169, 170. *Vin. Abr. tit Prerogative*, B. a. *Com. Dig. tit. Prerogative*, and *Bacon's Law Tracts*, 126. 2d ed., it is clearly to be understood that land formed gradually by alluvion, goes to the owner of the adjoining land as of common right. In *Roll.* pl. 11, it is said "if the salt water leave a *great quantity* of land on the shore, the king shall have the land by his prerogative, and the owner of the adjoining soil shall not have it as a perquisite." Sir *W. Blackstone* (a) refers to that passage in *Roll.* and expressly lays it down, that where land is gained by gradual alluvion, the property in it belongs to the subject and not to the crown. Lord *Hale*, in his treatise *De Jure Maris*, p. 14, obviously alludes to two different modes by which land may be increased by alluvion; for, after defining what increase by alluvion is, he goes on: "But, indeed, if such alluvion be so insensible that it cannot be by any means found that the sea was there, idem est non esse et non apparere; the land thus increased belongs as a perquisite to the owner of the land adjacent." It is observ-

(a) 2 Comm. 261.

able that Lord *Hale* does not cite any authority, nor even suggests it as necessary in such case that the owner of the adjacent land must found his right in custom or prescription. If the criterion of imperceptibility be such as is insisted upon on the other side, it is inconsistent with the Abbot of *Ramsay's* case, where the dispute was respecting sixty acres of land, which had increased during a period of a great many years. It would be impossible for the subject in any case to claim land by alluvion, if the test of his right is the imperceptibility of the accretion in its daily progress. Indeed in no case would there be any dispute whatever, if the increase is so imperceptible as to defy the evidence of metes and bounds. But it is not because it is perceptible in a course of years, that it becomes the property of the crown; for if it is minute and inconsiderable in the first few years, its greater increase at a subsequent period in the same gradual manner will not deprive the subject of the right which had previously vested in him. For instance, if at the end of twenty years, the crown cannot take from the subject land which has increased by gradual and insensible alluvion during that period, upon what principle can it take it at the end of sixty years, when a still greater increase by the same means has arisen? The answer to the claim of the crown is, that as the land has increased gradually and imperceptibly, without any assertion of right to the contrary, it has become vested in the subject, and cannot now be devested. It has become vested in the subject, because it has been formed gradually and imperceptibly, and upon the principle laid down by Lord *Hale*, it cannot now be taken from the subject. The case put in *Callis*, 51, from the 22 Lib. Ass. pl. 93, fortifies the principle, and indeed gives the true test by which this point is to be decided. "The case was," as *Callis* represents it, "that a river of water did run between two lordships; and the soil of one side, together with the river of water, did wholly belong to one of the said lordships; and the river by little and little did gather

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upon the soil of the other lord, but so slowly, that if one had fixed his eye a whole day thereon together, it could not be perceived. By this petty and unperceivable increase, the increasement was got to the owner of the river; but if the river by a sudden and unusual flood had gained hastily a great parcel of the other lord's ground, he should not thereby have lost the same. And so, of petty and unperceivable increasements from the sea, the king gains no property, for de minimis non curat rex." Upon the authority of this case, confirmed as it is by Lord *Hale*, *Com. Dig. tit. Prerog.* (D. 61) *Dyer*, 326. 2 *Roll. Abr. Prerog. B.* pl. 9, 10; and 2 *Bl. Com.* 261; this being land formed by gradual and imperceptible alluvion, it is of common right the property of the subject, and does not belong to the crown. On the whole, therefore, the verdict on these issues was rightly found, and judgment must be given for the defendant.

Goulburn, in reply. The argument on the part of the crown has received no satisfactory answer on the part of the defendant. The increase of land here, has not been so imperceptible in its progress as to establish the first issue in the defendant's favour. As to the second, the word "left" or "derelict," is not to be understood in the sense in which it has been treated on the other side. It does not mean a sudden recession of the sea, but is equally satisfied by proof of a gradual leaving or recession of the water from the land; and in that sense, entitles the crown to judgment. The case from *Dyer*, C. J., and the note of *Treby*, C. J. thereon, are clearly in favour of the argument for the crown. The answer to C. J. *Dyer*'s quære "that the prince shall have all lands left by or gained from the sea," shews that, whether the land is left by gradual reliction, or increased by imperceptible alluvion of the sea, it is equally the property of the king by his prerogative: and *Treby*, C. J. refers in the margin to the case of the corporation of *Romney* and *Broomhill*, in *Kent*, *T.* 43 *Ed.* 3. Rol. 13.

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The case cited in *Callis*, from the 22 *Lib. Ass.* pl. 93, was the case of a dispute between *subject and subject*, and not between a subject and the crown, and therefore is no authority for the present case, which stands entirely upon the king's prerogative. Admitting to the fullest extent the doctrine, that where the increments are so petty and imperceptible, as that they shall go as a perquisite to the subject, according to *Callis*'s application of the maxim, "de minimis non curat rex;" yet the increase here, is neither petty nor imperceptible; on the contrary, it is very considerable and observable every year. As before observed, such increments must, from the course of nature, be gradual and almost imperceptible in their conformation, but the king is not the less entitled to have them, in virtue of his prerogative. This is not a case within the exception stated by Lord *Hale* (*a*), where the alluvion is so insensible that it cannot be by any means found that the sea was there, idem est non esse et non apparere, &c. If nothing is to be found in the earlier authorities upon this subject prior to *Dyer*, it may be plainly inferred that the proposition now contended for was never before disputed. Certainly nothing can be presumed against the rights of the crown, from the absence of any earlier authority. The probability is, that the later cases have their foundation in the doctrine of *Bracton*, who relies upon the civil law; and if so, it is clear they are not to govern the rights of the crown, which depend upon the common law of *England*. Indeed, in the argument on the other side, *Bracton* was given up, and he certainly was not relied upon as of any authority. In *Blundell* v. *Catterall* (*b*), it is said by *Holroyd*, J., that the authority of *Bracton* cannot have any weight or authority unless the doctrines which he lays down are confirmed or adopted by our own lawyers, and particularly if they are found not to be consistent with, and conformable to the doctrines and principles of the common law.

(*a*) De Jure Maris, 14. (*b*) 5 B. & A. 268.

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The Court took time to consider the case, and judgment was now delivered by

Abbott, C. J.—The only point on which the Court is called upon to pronounce any opinion in this case is, whether the evidence given at the trial was such as to warrant the verdict of the jury upon the issues joined. Whether the pleadings have been correctly framed on either side, or what may be the legal result of the verdict, supposing it remains unimpeached, are not matters for our present consideration. This observation becomes necessary, because a considerable portion of the argument at the bar was applicable more to a matter of law upon undisputed facts, than to the question whether the issues upon this record are supported by the evidence. The second issue arises upon a traverse of the matter found by the inquisition. The matter so found is that the land now claimed by the Crown was in times past covered with the water of the sea, but is now and has been for several years *left* by the sea. Now, the distinction between land derelict, or left by the sea, acquiring a different character in consequence of the mere subsidences of the salt water, and land gained by alluvion, or *projection* of extraneous matter, whereby the sea is excluded and prevented from overflowing it, is easily discernable in fact, and recognised by all the authorities upon the subject of maritime increments. According to the evidence, there is not the least doubt that the land in question is of the latter description; and therefore, the issue found for the defendant upon that question was correctly found for the defendant. The principal question arose upon the first issue, and it is, as already observed, a mere question of fact. The defendant pleads that "the land in question, by the slow, gradual, and imperceptible projection, alluvion, subsidence, and accretion of ooze, soil, sand, and other matter, being slowly, gradually, and by imperceptible increase, in long time cast up, deposited, and settled, by and from the flux and reflux of the tide and water of the sea, in, upon,

and against the outside and extremity of the demesne lands of the manor, hath been formed, and hath settled, grown, and accrued, upon, against, and unto the said demesne lands." On the part of the Crown this allegation has been denied, and issue taken thereon. The allegation refers only to the *manner* in which the land has been formed. It avers nothing as to the *result* of its formation; nothing as to the possibility of determining after its formation, by any limits, or marks, or quantity, previously existing and known, or by measure, to commence and be taken from such limits, or marks, or with regard to such quantity, how much is now land, which was formerly sea. There is no doubt from the evidence, that the land has been formed slowly and gradually in the manner averred in the plea. Much stress was laid upon the word "imperceptibly," and a good deal of discussion arose as to the proper meaning to be ascribed to it. On the part of the Crown two passages were quoted from Lord *Hale's* Treatise *De Jure Maris*, wherein that very learned author speaks of land gained by alluvion, as belonging generally to the Crown, unless the gain be so insensible, that it cannot be "*by any means*" (according to the language of one of the passages) or "*by any limits or marks*," according to the other, found that the sea was there, *idem est non esse et non apparere*. It is to be observed, however, that the learned writer is addressing himself to the legal consequence of such an accretion, and does not profess to explain what ought to be considered as "*accretion, insensible*, and *imperceptible*," in itself, but merely defines that to be *insensible* of which it cannot be predicated with certainty that the sea was ever there. An accretion so small as not to be perceptible by any previous marks at the end of four or five years, may by gradual increase become obvious by such marks at the end of a century, or even thirty or forty years. It is to be observed, however, that if the mark on one side be land, or something growing or placed thereon, as a tree, or a house, the boundary on the other side will be the sea, which rises to a height fluctuating al-

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most at every tide, and of which the variations do not depend simply on the ordinary course of nature at ascertained periods, but in part also upon the strength, direction, and duration of the winds, which are different at every season; and, therefore, these passages from Lord *Hale* are not properly applicable to this question. Construing the word "imperceptible," in this issue (as we certainly must) in connection with the words "slow and gradual," we think it can be understood as descriptive only of the mode and manner of the accretion, as the other words unquestionably are, and as meaning imperceptible in its *progress*, and not imperceptible after a long series of years. Taking this to be the true meaning of the word "imperceptible," the only remaining point for consideration is, whether the accretion of this land might fairly be considered by the jury, upon the evidence, as imperceptible. Not one of the witnesses has stated that it could be observed either in its progress, or at the end of a week or a month. The first witness, who had measured the land twice, says, that within the last four years he could ascertain that the sea had receded, but he could not say how much. The same witness added, that it certainly had receded since he measured it last year, but he did not state how much. According to his evidence, the gain, within a period of twenty-six or twenty-seven years, had been, upon an average, five yards and a half per annum. The second witness spoke of an increase of from 100 to 150 yards in fifteen years, which is a much more considerable increase than that deposed to by the first; and according to this same witness, there had been a visible increase of from thirty to fifty yards in some parts, during the last five years. The evidence of this second witness is certainly very loose, the difference between 100 and 150 yards in fifteen years, and between thirty and fifty in five years, being very extraordinary. The third witness said, there had been some small increase in every year; and the fourth said, that the swarth increased every year very gradually, and "perhaps" it had gathered a quarter of a mile in breadth in some

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places within his recollection, or during the last fifty-four or fifty-five years, and in some places it had gathered nothing. This being the whole of the evidence upon the subject, we think, that the jury might very reasonably draw the conclusion from it, that the increase had not only been *slow and gradual*, but also *imperceptible*, according to the sense in which that word ought to be construed. The result, therefore, is, that there is to be no new trial, and the judgment is to be entered for the defendant upon the finding of the jury.

Judgment for the defendant.

Some misunderstanding having arisen as to the import of the judgment given by the Court,

The Attorney-General mentioned the case again, and said he believed the Court had carefully avoided giving any opinion upon the general question as to the correctness of the pleadings, and the legal effect of the finding of the jury.

Abbott, C. J.—We did so studiously. I expressed a doubt whether the pleadings were on either side so correctly framed as they might be. If any further investigation of the general question shall take place, the defendant will have reference to the course adopted in the Abbot of *Peterborough*'s case (*a*), and put his case on the record in a more beneficial manner than he has here done. The Court has propounded a special rule in this case, namely, that no new trial is to be granted, and that judgment shall be entered for the defendant on this verdict.

(*a*) De Jure Maris, 29.

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Thursday, July 6.

In an action by an attorney for a libel the declaration averred that the libel was "of and concerning him generally," *and* "of and concerning him in his business and profession of an attorney:" Held, that this was a divisible allegation, and that though the plaintiff could not prove he was a certificated or practising attorney at the time the libel was published, yet he was entitled to maintain the action for the libel on his character generally.

LEWIS, Gent. one &c. *v.* WALTER.

CASE for a libel published in *The Times* newspaper. The first four counts of the declaration stated that plaintiff was an attorney, and that defendant maliciously contriving and intending *to injure him in his good fame*, AND *also in his said business and profession of an attorney*, published the libel in question, "of and concerning *him the said plaintiff*, AND of and concerning *him in his said business and profession of an attorney.*" There were two other counts not necessary to advert to particularly. The libel set out in the declaration purported to be a speech of counsel at a trial of the plaintiff on a criminal charge; and it stated, after setting out the speech, that a witness was called, who proved all that had been stated by counsel, and that the plaintiff was immediately after that acquitted, upon a defect in proving some matter of form. The declaration alleged that the defendant well knowing the premises, and wishing to cause it to be believed that the plaintiff had really been guilty of the offence with which he was charged, composed and published the libel. The defendant pleaded the general issue, not guilty, and five special pleas. To all the pleas except the first there was a demurrer, which was argued in *Trinity*, 1821 (*a*). On the trial of the issue of not guilty, before *Abbott*, C. J. at the *London* Adjourned Sittings after *Michaelmas*, in the same year, it appeared in evidence, that the plaintiff had been admitted and enrolled as an attorney of this Court on the 5th *July*, 1813, but failed in proving that in 1819, when the libel was published, he had taken out his certificate, or had practised as an attorney during that period. Whereupon it was objected, that as the libel was described in the declaration to be of and concerning the plaintiff, and of and concerning him in his business and profession of an attorney, and as it was not proved

(*a*) See 4 B. & A. 605.

that he was a certificated attorney pursuant to the 37 *Geo.* 3. c. 90. there must be a nonsuit. The Lord Chief Justice thought the objection fatal, and nonsuited the plaintiff, with liberty, however, to move to set the nonsuit aside.

Copley, S. G. in *Hilary* Term, 1822, moved accordingly and contended that the allegation in the declaration on which the objection arose, was divisible; but supposing it to be necessary to prove that the plaintiff was a certificated practising attorney at the time the libel was published, (which he denied to be necessary for this purpose, inasmuch as the plaintiff was admitted and on the rolls,) still as the libel was also alleged as matter of inducement to be of and concerning him in his personal character, without reference to his business and profession of an attorney, the action was sustainable. He cited *Figgins* v. *Coggswell* (*a*) as a case in point, and on the authority of that decision the Court granted a rule nisi; the Court then intimating as their opinion, that if the publication was libellous of the plaintiff, whether he was an attorney or not, the action would be maintainable.

Scarlett, *Brougham*, *Robinson* and *Platt*, shewed cause in *Trinity* Term, 1822. The allegation that the libel was of and concerning the plaintiff, and of and concerning him as an attorney is entire, and the proof must be co-extensive with the whole allegation. The plaintiff sets out in the declaration, by describing himself as an attorney, and all the subsequent allegations refer back to that description, and relate to him as an attorney, and in that character only. [*Bayley*, J. The declaration alleges the libel to be of and concerning him personally, and of and concerning him as an attorney. Is not proof of either enough?] This is not a divisible allegation. The introduction of the word "and" ties up the whole, and forms one entire proposition. There

(*a*) 3 M. & S. 369.

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is no distinct and independant allegation that the libel is of and concerning him *generally*. [*Bayley*, J. There are two distinct allegations, one *of him* generally; and another *of him* as an attorney. If the libel is proved to be of him generally, there is no necessity, I apprehend, to prove that he was in fact an attorney. The general proof will sustain the declaration.] This objection was not taken at the trial, and ought not now to prevail. It was not pretended then, that proof of the libel being of and concerning the plaintiff generally would be sufficient. This is, however, one entire allegation. It is a general rule, that an averment must be proved, though irrelevant and immaterial. The case of *Figgins* v. *Coggswell* is distinguishable from this, because there it appeared that the slanderous matter was of and concerning the plaintiff in one trade only. The same observation is applicable to the case of *Hall* v. *Smith* (a); and in both those cases the point arose upon the matter of inducement. This is not matter of inducement, but is part of the description of the libel published. *Smith* v. *Taylor* (b) is in principle in point with the present case, and shews the necessity of giving adequate proof of the description of the slander. The plaintiff, therefore, having failed in proving his description of the libel, cannot maintain this action.

Copley, S. G. and *Chitty*, contrà. The principle upon which this case must be decided is, that in all actions of tort, it is unnecessary to prove all the allegations in the declaration; but only so much as will prove the injury of which complaint is made. The plaintiff in this case having proved that the libel is of and concerning him generally, he has done enough. If the matter per se is libellous of the plaintiff generally, without reference to any particular character or profession, it is a known and acknowledged principle, requiring neither argument nor authorities, that the

(a) 1 M. & S. 287. (b) 1 N. R. 196.

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action is sustainable, This case is distinguishable from *Teesdale* v. *Clement* (*a*), because there the fact on which the plaintiff failed in proof was material to the defamatory character of the libel itself. Now here the fact which the plaintiff has failed in proving is wholly immaterial. But, admitting its materiality, still it was sufficient to shew that the plaintiff was admitted and enrolled as an attorney. It was unnecessary to shew that he was either certificated or admitted. If he acts as an attorney, though he does not prosecute or defend any suit, it is enough. In *Berryman* v. *Wise* (*b*), it was decided in an action by an attorney for words spoken of him in his profession, that he need not prove that he is an attorney by his admission, or by a copy of the roll of attornies; it is enough to prove that he acted as such. The case of *Figgins* v. *Coggswell* is a parallel authority, and the principle of *Roberts* v. *Camden* (*c*) is also applicable. There is no rule of law which puts libels on a different footing from any other species of tort. The old rule is, that the plaintiff may recover as much as he can prove. Here the plaintiff has proved that the libel is of and concerning him generally, and that is enough to sustain the verdict, and therefore this rule must be made absolute (*d*).

ABBOTT, C. J.—The question is whether these are words of description; and if so, whether they must be proved. The case is of considerable importance, and we shall take time to consider of it.

Cur. adv. vult.

Judgment was now delivered by

ABBOTT, C. J. who, after detailing the facts of the case, briefly stated, that it was in all respects parallel to *May* v.

(*a*) 1 Chitty's Rep. 605. (*b*) 4 T. R. 366. (*c*) 9 East. 93.
(*d*) Vide Palmer, 259. 2 B. & A. 360. Id. 685. 1 Campb. 139. 530. 2 Campb. 76 & 583. 4 M. & S. 532. Cowp. 672. 2 Stark. 510. 5 T. R. 496.

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Brown (a), and must be governed by the decision of the Court in that case. The rule for setting aside the nonsuit must therefore be made absolute.

Rule absolute.

(a) Ante, 670.

Tuesday, July 6.

LOVE, executor, v. HONEYBOURNE.

Where by a Judge's order, a cause and all matters in difference between the testator of an executor and the defendant, were referred to arbitration, and the arbitrator awarded that a sum certain was due to the defendant upon the balance of accounts, and directed the executor to pay the money out of assets on a given day without determining whether in point of fact the executor had assets to pay the money on the day appointed: Held, that the award was not void for uncertainty.

BY a Judge's order, this cause (which was an action of assumpsit) and all matters in difference between the plaintiff's testator and the defendant, were referred to arbitration. The arbitrator, upon the investigation of the accounts, ascertained that there was a balance against the plaintiff's testator of 48*l.* 6*s.*, and by his award directed the plaintiff to pay that sum to the defendant out of the assets in his hands as executor, on a particular day named in the award. A rule nisi was obtained on a former day to set aside the award, on the ground that it was void for uncertainty, inasmuch as the arbitrator had not ascertained whether in point of fact there were any assets in the plaintiff's hands to pay the sum awarded.

C. F. Williams, on shewing cause, was stopped by the Court.

R. Bayly in support of the rule. The award is uncertain, because it directs the plaintiff to pay the sum awarded on a given day *out of assets*, when non constat that there will be any assets in his hands on the day appointed. This is not like a judgment, *quando* the executor has assets, which would be sufficiently certain. The arbitrator should have ascertained by his award, whether there would be assets in the plaintiff's hands on the day appointed for the payment of the money; and if he had not the means of paying on that day, quâcunque viâ datâ, the award is void for un-

certainty. Submission by an executor or administrator to a reference, is not an admission that he has assets, *Pearson* v. *Henry* (a). Here the plaintiff is ordered to pay at all events, without ascertaining whether there will be assets, and therefore the award is bad on the face of it, because it is uncertain whether the executor shall pay any thing, inasmuch as he is not bound to pay, if he has fully administered his testator's effects. He referred to *Worthington* v. *Barlow* (b).

ABBOTT, C. J.—I think we cannot set aside this award for uncertainty. One part of it is unquestionably certain, namely, that part which finds that the plaintiff, as executor, is indebted upon the balance of accounts to the defendant, in the sum of 48*l*. 6s. of lawful money of *Great Britain*. The part of the award which directs the plaintiff to pay that money on a given day out of the assets of his testator's estate, is totally independent of the question of amount. It appears to me, that this latter part of the award does not conclude the question of assets, but leaves that open. If the award is void for uncertainty, it will do no harm, the question of assets being left open. I am satisfied, however, that if the submission to the reference has concluded the question of assets, the plaintiff has concluded himself without any fault of the arbitrator; but that is a question which we are not called upon to decide. It is enough to say for the present, that that part of the award which fixes the balance due, is certain beyond all manner of question, though the other part of it may not conclude the plaintiff from questioning whether he has any assets or not to pay the money. The question is, whether the award has ascertained the plaintiff's chargeability with sufficient certainty, and I think it has.

HOLROYD, J. (c).—By the submission, all matters in

(a) 5 T. R. 6. (b) 7 T. R. 453.
(c) *Bayley*, J., was absent.

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difference between the parties are referred to the arbitrator, who, instead of finding any thing to be due to the executor, finds that a balance of 48*l.* 6*s.* is due to the defendant. Then the award goes on to say, that which Mr. *Bayly* contends makes it uncertain; but even supposing that part of the award not to be sufficiently certain for not determining whether the plaintiff has any assets, still that will not vitiate the other part of the award. There may be a sufficient reason for the arbitrator not having determined that point. He may not have had the means of ascertaining what funds were in the plaintiff's hands; but the law imports that the money is to be paid in the way directed by the arbitrator. The arbitrator awards that the money shall be paid by the plaintiff out of the assets, upon a day which he fixes; i. e. if there are any assets in his hands at that time. If the plaintiff had fully administered at that time, he would not be bound to pay, even according to the terms of the award. But assuming that part of the award to be bad, still it would not make void the residue, which ascertains that the one party is indebted to the other in so much money. The direction as to the manner in which the money is to be paid would not affect the adjudication as to the sum actually due.

LITTLEDALE, J., concurred.

Rule discharged.

Wednesday, July 7.

The KING v. JOSEPH TURNER.

Where a defendant had removed an indictment from the sessions into this Court by certiorari, and was convicted, but died before he could be brought up for judgment: Held, that his bail were liable to pay the taxed costs of the prosecution, under 5 W. & M. c. 11. s. 3.

THE defendant having been indicted at the *Doncaster* Borough sessions for an assault on *Ann Lister*, removed the indictment, by certiorari, into this Court, and entered into the recognizance required by the statute 5 *W.* & *M.*

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c. 11. s. 2. The defendant was tried and convicted at the last Lent Assizes for the county of *York*, but died before the day in banc. The prosecutor, in pursuance of the 3d section of the statute, caused his costs to be taxed in the Crown Office, according to the course of the Court; but not being able to obtain payment of them, moved by counsel on a former day for a rule calling upon the defendant's sureties to shew cause why their recognizances should not be estreated, an affidavit being produced that *C. Lister*, the husband of the prosecutrix, was the party grieved. *Rex* v. *Finmore* (a) was cited as an authority expressly in point.

D. F. Jones now shewed cause. Whether the bail in this case are liable to pay the prosecutor's costs will depend upon the construction which the Court will put upon the 5 *W.* & *M.* c. 11. s. 3. which enacts "That if the defendant prosecuting the writ of certiorari be *convicted* of the offence for which he was indicted, the Court shall give reasonable costs to the prosecutor, if he be the party grieved or injured, which costs shall be taxed according to the course of the Court; and the prosecutor for the recovery of such costs shall, within ten days after demand made of the defendant, and refusal of payment on oath, have an attachment granted against the defendant by the Court for such his contempt; and the recognizances shall not be discharged till the costs so taxed shall be paid." Now this motion was made on the authority of *Rex* v. *Finmore*, but that case seems to have been decided without due consideration, the counsel in support of the motion having been stopped by the Court. The question is, whether the word "convicted," in the statute, means a conviction by the verdict of the jury, without the judgment of the Court. If the former, it is clear that the bail would not be liable for costs, because the defendant is prevented from being brought up for judgment by the act of God. The bail have performed the condition of their recognizance.

(a) 8 T. R. 409.

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The defendant appeared, pleaded, gave regular notice of trial, and tried the indictment, which was all that the bail undertook should be done. Conviction, in the statute, means a *judgment*, and no costs are due until a conviction; and the bail cannot be called upon until some part of the condition of their recognizance is forfeited. In *Rex* v. *Lyon* (a) the bail were held liable only because the recognizance was forfeited for not proceeding to trial according to notice; and in *Rex* v. *Earl* (b), where there was a rule for the prosecutor of an information to pay costs for not going on to trial, as the defendant died before they were paid, it was holden, that the executor could not have them, and that he would not have been liable if the testator had been ruled to pay them. Had there been a complete forfeiture of the recognizance, perhaps the bail would have been liable; but here they have done every thing which they were required to do. At all events the prosecutor is premature. He ought to have shewn by affidavit that he had demanded the costs of the defendant before his death, or that a demand had been made of his administrator. In *Rex* v. *Finmore* there was an affidavit to that effect. There is no affidavit here as to the time when the defendant died, or that there was any personal demand made of him before his death. Before the bail can be made liable, there must be a demand made of the defendant's personal representative. This does not appear to have been done, and therefore this rule must be discharged.

Brandt, in support of the rule, was stopped by the Court.

Abbott, C. J.—I think the case of *Rex* v. *Finmore* is a decisive authority. There an indictment having been preferred against the defendant at the quarter-sessions, he removed it hither by certiorari, giving the usual recognizance required by the statute. He was found guilty at the assizes, and afterwards died before the day in

(a) 3 Burr. 1461. (b) 2 Stra. 874.

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banc. The costs of the prosecution were afterwards taxed; and they not having been paid by the administrator of the defendant, a rule was obtained calling on the defendant's bail to shew cause why their recognizance should not be estreated on the usual affidavit, stating that the prosecutor was the party grieved (*a*); and the Court held that the case came expressly within the words of the statute, which are, "that the said recognizance shall not be discharged till the costs so taxed shall be paid." I am clearly of opinion that "convicted" does not mean convicted *by the judgment of the Court*, but convicted *by the verdict of the jury*. The object of the statute allowing the certiorari in these cases, is to indemnify the prosecutor for the extra expense to which he is put by removing the indictment from the inferior to the superior jurisdiction, and whether the defendant be prevented by the act of God from coming up to receive judgment, makes very little difference to the prosecutor as to the expenses he has incurred. The defendant being dead, the prosecutor has no remedy by attachment, and therefore can have recourse only to the bail. It is said that a demand should have been made of the defendant's personal representatives; but non constat that he has any personal representatives upon whom a demand could be made. The bail do not now shew by their affidavit that he has any personal representative; and the onus lay upon them to have done so, if that fact could have availed them anything.

Bayley, J.—I am of the same opinion. The word "convicted," by the statute clearly means convicted by the verdict of the jury, and not convicted by the judgment of the Court.

Holroyd, J. concurred (*b*).

Rule absolute.

(*a*) Vide 2 T.R. 47. 5 Id. 33. and 7 Id. 32.

(*b*) *Littledale*, J. was absent.

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Wednesday, July 7.

A resident inhabitant of a town corporate has a right to inspect and take copies of a by-law of the corporation, pending an action against him for a breach of the same, although he is not a corporator; and mandamus will lie for this purpose.

HARRISON and another *v.* WILLIAMS.

CHITTY on a former day obtained a rule calling on the Corporation of the City of *Chester* to shew cause why a mandamus should not issue directed to them, commanding them to permit the defendant to inspect the corporation books, for the purpose of seeing and taking a copy of the by-law for the violation of which this action was brought. It was an action of debt by the treasurers of the corporation, to recover penalties against the defendant for exercising the trade of a tanner within the city, contrary to a by-law of the corporation, which forbids persons carrying on trades within the city who are not freemen thereof. The motion was made on the authority of *The Brewers' Company* v. *Benson* (*a*).

D. F. Jones now shewed cause. The defendant not being a member of the corporation has no right to inspect its books. He is to all intents and purposes a stranger and a foreigner, and, therefore, the Court has no authority to compel the corporation to submit its books to his inspection. The case of *The Brewers' Company* v. *Benson* has been virtually overruled by subsequent decisions; *Talbot* v. *Villeboys* (*b*), and *Hodges* v. *Atkis* (*c*). But in the *Mayor of Southampton* v. *Graves* (*d*), in which all the authorities upon this subject were fully considered, it was expressly held, that pending an action by a corporation for tolls, the Court will not grant leave to inspect the corporation muniments on application of the defendant, a stranger to the corporation. Though the action in that case was for tolls, still the principle of the decision is applicable to this, because here the defendant, a stranger, is seeking to inspect the corporation muniments. The decisions in later times have allowed this

(*a*) Barnes, 236.
(*b*) 3 T. R. 142. in which it is cited.
(*c*) 3 Wils. 398.
(*d*) 8 T. R. 590.

advantage to corporators, who may be supposed to have an interest in the proceedings of the corporation; but it would be an anomaly if a perfect stranger were allowed such a privilege. Whatever a court of equity may do, it seems clear that a court of law has no power to order such an inspection. In the case last referred to, Lord *Kenyon* said, "Lord *Hardwicke*(a), who perfectly well understood the boundaries between the courts of law and equity, expressly said, that courts of law cannot grant such an inspection as is prayed for in this case, though a court of equity can; but then a court of equity will only do it in certain cases, after examining into the circumstances of the case." The same learned judge illustrates the injustice of the principle by putting this case: "suppose an application of this kind were granted in a court of law against a purchaser of an estate for a valuable consideration without notice of some prior estate, the defect is disclosed to the adverse party, who gets possession of the prior deeds and then defeats such purchaser at law." Corporations, like individuals, have their rights and estates, and there is no more reason for compelling a corporation to exhibit its muniments to an adverse party, than there is for compelling a private individual to exhibit his title deeds. But in point of fact, there can be no necessity in this case for an inspection of the by-law in question, because it will be a necessary part of the plaintiff's case to produce it in evidence on the trial, and then the defendant will have abundant opportunity of knowing what he is called upon to answer. He has no more right beforehand to see the by-law than he would have to see the title deeds of a plaintiff suing in his individual character. At all events this application is premature, because the affidavit upon which the rule nisi was founded, does not shew any application, and refusal, to see the by-law, which is necessary before the defendant can come to the Court to require a compulsory inspection.

(a) 2 Ves. 620.

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Chitty, contrà. This case is perfectly distinguishable from *The Mayor of Southampton* v. *Graves*, which was an action against the defendant for certain tolls for wharfage on landing goods. Here the action is founded on a by-law which affects all the inhabitants and resiants of the city of *Chester* at large, and that was the ground of the decision in *The Brewers' Company* v. *Benson*. If the defendant is to be sued in penalties for violating a by-law of the corporation, he has at least a right to know by what authority, and upon what principle it is founded. This application is justified upon public grounds, and does not seem to affect the rights of property with which the corporation may be invested. It is perfectly distinguishable from the case of a defendant desiring to inspect the title deeds of a plaintiff, which affect his private and individual rights. The case in *Barnes* has never been overruled, and on the authority of what is there said this rule must be made absolute.

ABBOTT, C. J.—I certainly do not find that the decision in *The Brewers' Company* v. *Benson* has been overruled. That was an action on by-laws of the company against the defendant for exercising the trade of a brewer, he not being a member of the company, and the decision seems to have proceeded on the ground that "by-laws affecting strangers, interest them therein," and the Court made the rule absolute for the defendant to inspect the company's books and take copies of the by-laws. There is a very intelligible and sensible distinction between a case where a plaintiff is claiming tolls, which may depend upon private rights, &c. and that where a corporation is suing upon a by-law, which may affect all the inhabitants of a place, and on that ground I think the case of the *Mayor of Southampton* v. *Graves* is mainly different from this. I fully agree with what Lord *Kenyon* says, that a claim to tolls is like a claim to land or any other estate, and that a court of law cannot compel a person to shew the title deeds of his estate, and that in that respect there is no difference between a corporation and a

private individual. But this case is totally different. The party against whom the action is brought is not altogether a stranger in the corporation, for he is living in a place in which he is under their rule and government, and if an action is founded upon a supposed law laid down for the government of the city, he cannot by any means be said to be a stranger, (though not a corporator), with reference to the law by which he is to be affected. I think the case cited from *Barnes* is founded in good sense and reason, and I know of no case in which it has been overruled. This by-law is, I apprehend, made for the government of *all* resiants in the city, and as the corporation have brought an action for its violation, I think it is reasonable that the defendant should have an inspection of such of their books as will shew him what is the law of the place in which he is living. As to the objection that the defendant has not made any demand, I think this is a case in which a demand may be dispensed with, for this application shews that it would have been fruitless.

BAYLEY, J.—Every man has a right to trade in any place, unless the right is taken away by custom or by law, and he has a right, though not a corporator, to inspect the corporation books for the purpose of seeing what the law is, which he is charged with having violated.

HOLROYD, J. and LITTLEDALE, J. concurred.

The COURT made the rule absolute for a peremptory mandamus to the corporation to allow the defendant or his attorney to inspect such of the corporation books as related to the matter in question in *this cause*, and that the town-clerk should give copies of the by-laws to the defendant, the latter paying the expense of such copies, and also paying the town-clerk for his attendance.

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The KING *v.* J. MIDDLETON.

The driver of a stage van travelling to and from *London* to *York* is a common carrier within the meaning of the 3 *Car.* 1. c. 1. and subject to the penalties thereof, for travelling on *Sunday.*

THE defendant having been convicted and fined 20*s.* by two justices for the Borough of *Stamford* in *Lincolnshire,* as a carrier, for driving a *van* on a *Sunday,* contrary to the statute 3 *Car.* 1. c. 1. "An act for the further reformation of sundry abuses committed on the Lord's day, commonly called *Sunday*" (*a*),

D. F. Jones moved for a writ of certiorari to remove the conviction into this court, for the purpose of being quashed for insufficiency. The defendant, as the mere driver of a van travelling to and from *London* to *York,* is not a carrier within the intent and meaning of the statute. That statute ought to be construed most strictly, especially in modern times, when the necessities and convenience of commerce require a free and uninterrupted communication between different parts of the kingdom. The object of the statute must be taken to have been to prevent the wanton and idle violation of the decorum of the Sabbath day, and not to obstruct the free intercourse between the metropolis and the distant provinces of the country. Now, a *van* is not one of the carriages mentioned in the statute, and if not, then according to the acknowledged rule by which penal acts of parliament are to be construed this conviction cannot stand. The statute enacts, "That no carrier with any horse or horses, nor waggon-men with any waggon or waggons, nor carman with any cart or carts, nor wainman with any wain or wains, nor drover with any cattle, shall travel upon the said day, upon pain that every person and persons so offending shall lose and forfeit twenty shillings for every such offence." It would be highly inconvenient to the public, if in these times, this statute were to be strictly enforced. Undoubtedly, the defendant, as the servant of a

(*a*) See 1 Car. 1. c. 1. 29 Car. 2. c. 7. and 10 & 11 W. 3. c. 24. s. 14.

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carrier, is within the mischief of the act, if his van falls under the description of carriages therein enumerated; but by the same rule of construction the drivers of the royal mail coaches, and of every description of stage coach, which happened to ply and carry parcels and passengers on *Sunday* for hire, would, as common carriers, be subjected to the penalties of the statute at every place through which they happened to pass.

ABBOTT, C. J.—We are not called upon to give any opinion whether the drivers of mail and stage coaches are carriers within the purview of this statute; but we have no doubt whatever, that the driver of a van is a carrier within the intent and meaning, if not the very terms of this statute, which has for its object the due observance of the Sabbath day, and therefore ought to receive a liberal construction.

BAYLEY, J. and HOLROYD, J. concurred.

Rule refused.

The KING v. The Lord of the Manor of BONSALL, and the Steward of the said Manor.

Wednesday, July 7.

Tenants in coparcenery of a copyhold estate are in law but one heir; and it seems that they are entitled to admittance upon the payment of one fine to the lord, and one set of fees to the steward of the manor.

ON shewing cause against a rule nisi for a mandamus to be directed to the lord of the manor of *Bonsall* in the county of *Derby*, and to *A. Wolley*, the steward of the said manor, commanding them to admit *R. Ward*, or the co-parceners and heirs of *S. Richardson*, deceased, to a copyhold close, or parcel of land, consisting of about six acres and a half, situate, lying, and being within the said manor, and which had been duly surrendered to the use of

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the said *S. Richardson* and his heirs, according to the custom of the manor, the case on affidavit was this:—*S. Richardson*, after having made his will, purchased the copyhold estate in question, in 1818, and duly surrendered the same to the use of himself and his heirs for ever, and died on the 20th *January*, 1823, without altering his will. He left his daughters, *Catherine Richardson* and her three sisters his co-heiresses at law, and they became entitled to the copyhold estate in question, which was subject to a lord's fine of two shillings. It appeared, that before *S. Richardson* had purchased the estate, it had been held as two separate and distinct copyhold tenements, by two persons, as tenants in common, although he had been admitted to them as one tenement. *Catherine Richardson* and her co-heiresses having agreed to sell the estate to *R. Ward*, the applicant, they offered themselves for admission at a court-baron, when the steward insisted that they must be admitted separately for their respective shares *as tenants in common* to two tenements, and demanded two sets of fees from each, for himself, amounting in the whole to the sum of 34*l.* 13*s.* 4*d.* which they refused to pay, but tendered him 8*l.* 13*s.* 4*d.* being two sets of fees for the whole, as co-parceners. Under these circumstances *R. Ward* applied for a mandamus, in order to perfect his title, and the question was, whether the steward was not bound to admit the co-parceners as one heir, upon the payment of one set of fees.

Copley, A. G. and *N. R. Clarke* shewed cause. The only question in this case is, whether there is any substantial difference, as with respect to copyhold estates, between tenants in co-parcenery and tenants in common. Parceners hold their estates in severalty, and there being no right of survivorship, their shares descend to their heirs severally and respectively, and therefore the lord and his steward have a right to demand sets of fees from each. If this be not the case the lord might never have a fine, because, possibly there would be always a tenant living; inasmuch as the heir

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of a co-parcener becomes a co-parcener with the survivors. It may be conceded, that for some purposes co-parceners are considered as but one heir, but that is not so with respect to copyholds: the moment it is established that they have several interests, as they undoubtedly have here in point of legal effect, that moment the lord becomes entitled to several sets of fines. If the interests of tenants in common in a copyhold are distinct, and a separate fine is payable by each, the same reason applies to co-parceners, in order that the lord may not be prejudiced in his manorial rights. There certainly is no case to be found in which this question has been brought before the Court, but upon principle and analogy it seems clear that the consequence pointed out follows as of course. At all events, the estate in question must be considered as two tenements, and therefore there are at least two sets of fees payable. The estate formerly consisted of two separate tenements, and though they may be now united into one tenement, still, according to *Attree* v. *Scott* (a), the multiplication of fees continues. But *Rex* v. *Rennett* (b) shews, that a copyholder who claims by descent cannot have a mandamus to the lord to admit him; his proper remedy is in Chancery. *Lit.* s. 66, 67. *Cro. Jac.* 368. 1 *Rol. Abr.* 108.

Campbell, contrà. Here the co-parceners constitute in point of law but one tenant and one heir, and consequently are entitled to be admitted upon the payment of one fine to the lord, and one fee to the steward (c). In point of fact, two sets of fees were tendered, which is double what the steward was entitled to demand, for upon the authority of *Garland* v. *Jekyll* (d), the testator, *S. Richardson*, having been admitted to the whole estate as one tenement, the steward had

(a) 6 East, 476.
(b) 2 T. R. 197.
(c) See Watkins on Copyholds, 277, 8. 3 T. R. 165. 2 Plow. 614. and 9 Mod. 62.
(d) 7 J. B. Moore. 2 Bing. 273. S. C.

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no right afterwards to consider it as two. [Here the Court stopt him.]

Abbott, C. J.—If an heir applies to the Court for a mandamus with a view to try the title to a copyhold tenement as against a stranger, the Court may refuse the writ on his behalf, for as respects the stranger he has no title, but the bare admittance and the payment of the fine to the lord (a). But when the application for a mandamus is where there is no dispute between the heir at law and a stranger, then the case stands on a different footing. Here there is no dispute between the heir at law and any other persons; and the title of the co-parceners is out of the question. I have no doubt in the present state of things, that for the purpose of taking the inheritance the co-parceners form but one heir, and that they are entitled to be admitted as one heir, but I am not so clear whether more than one fine, or more than one set of fees, can or cannot be taken upon their surrender or their admittance. The present inclination of my opinion is, that they may make a joint surrender upon the payment of one fine and one set of fees. It is laid down, that co-parcerners may join in a demise, and if they may do that, I do not see why they may not join in a surrender, and be liable only to one set of fees. Upon that point, however, I wish to give no opinion with the same confidence that I do upon the other. The proper course will be to direct a mandamus to issue commanding the lord and his steward to admit the persons applying, and to accept their surrender, paying the *lawful* fees. If the lord or his steward shall hereafter wish to have the further opinion of the Court upon the point whether more than one set of fees may be lawfully demanded, it will be competent for them to do so, by making a return to the mandamus.

Bayley, J.—I have no doubt as to the propriety of granting a mandamus, for this is not merely the application

(a) See *Rex* v. *The Brewers' Company*, ante, 492.

of the heir, but of the person to whom the heir is desirous of conveying the estate; and therefore he has a right to clothe himself with the legal title, in order that he may stand in the relation of tenant and convey it to others. Upon the subject of the fees to be paid, I own, that as at present advised, I think the co-parceners are entitled to be admitted upon the payment of one fine to the lord, and one set of fees to the steward upon admittance; because the law considers them as constituting one entire heir. The inheritance descends entirely to all the co-parceners, and remains entire in them until they make a severance. If they afterwards make a severance, then they will convey in distinct parts; but if, instead of severing and conveying in parts, they all join in conveying to the same party, it seems to me there ought to be but one fine payable to the lord, and one set of fees payable to the steward; and then that mischief which, with reference to copyhold estates, is considered as existing, will be prevented: for it has been considered till lately, as a doubtful point, whether, when there has been once a severance and disunion of the estate, that would take away from the lord the right to different heriots, and from the steward the right to distinct fees. But in the case of an inheritance descending entire, and continuing entire until some act is done to sever it, I think the act of all the co-parceners in conveying the estate, has not the effect of severing it; but that it passes from them as an entire estate, and consequently but one set of fees is payable.

Holroyd, J.—At present the co-parceners have the unity of the estate in them, and they may pass it from them either by a joint conveyance or a joint demise; and that being the case, the law considers them as one heir. In the case of freehold, co-parceners may be tenants to one præcipe, because they have the unity of the estate in them. The same principle applies in the case of copyhold. At present the unity of estate being in these co-parceners, I think there

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should be but one fine, and for the same reason it seems to me that the steward would be entitled to one set of fees only upon the admission of the different persons constituting one tenant.

Littledale, J.—I am of opinion that an heir is entitled to a mandamus to admit in the case mentioned by my Lord Chief Justice. Here it is of importance to the purchaser of the estate, to know that he has a good title from the heir, and for that purpose it is necessary that the heir should be admitted. I also think that these co-parceners are in law but one heir, and are entitled to be admitted as one heir. Whilst the estate is united in them, co-parceners may join in one surrender. They may join in one avowry, and so in a surrender; and if so, why may they not be admitted upon the payment of one fine to the lord, and one set of fees to the steward? I really see no reason why they may not.

Rule absolute.

Wednesday, July 7.

Brown v. Murray.

After notice of trial in a libel cause, to which a justification was pleaded, the Court postponed the trial to enable the defendant to procure witnesses from abroad, (the sources of the proposed evidence being particularly pointed out), but imposed the term of his undertaking to admit on the trial the publication of the alleged libel.

CASE for a libel, to which the defendant pleaded not guilty, and several pleas of justification. The declaration had been delivered on the 29th *April* last, and issue having been joined on the defendant's pleas, which were pleaded last term, notice of trial was given for the adjournment day in *Middlesex* after this Term. On *Friday* last, a rule nisi was obtained for postponing the trial until the sittings after next *Michaelmas* Term, on the defendant's affidavit, that there were material and necessary witnesses to his defence, (whose names were mentioned) now at the *Ionian* Islands, and without whose testimony he could not safely proceed to trial. The affidavit further stated, that he was not apprised, until after notice of trial had been given, of the materiality of the evidence of the witnesses named.

Denman, C. S., and *Brougham*, now shewed cause, and contended that this was a case in which the trial ought not to be postponed. According to the doctrine lately laid down (*a*), the publisher of a libel must, before he publishes it, be able to vouch the truth of his statement, and be fully prepared to justify himself when called upon. Now here, the application to postpone the trial is not made until after notice of trial is given; so that, upon that general ground, this rule cannot be made absolute. At all events, it ought to be imposed as a term upon the defendant, that he should admit the publication of the matter charged to be libellous. It is by no means a matter of course, to postpone any trial after regular notice given, and more especially in the case of a libel, where the injury to the plaintiff by delay is most grievous.

Parke, in support of the rule. This is distinguishable from the case where a defendant may reasonably be expected to be fully prepared for his defence, because here the materiality of the witnesses was not ascertained until after notice of trial was given; and the particular sources of information are pointed out, and the names of the witnesses are mentioned, which need not have been done. This, therefore, is not an application for unnecessary delay, but is made bonâ fide for the furtherance of justice.

ABBOTT, C. J.—What was said in the case alluded to by the plaintiff's counsel is carried here a little further than the Court intended it should be. The general observation that a defendant in a libel cause should be fully prepared to defend himself, applies to all cases; and where there is a bonâ fide ground for delaying a cause, the Court will interfere. I recollect an application having been made by a defendant in a libel case, to postpone the trial until he could get particular information necessary to his defence; but

(*a*) See *Rex* v. *Harvey*, ante, vol. iii.

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inasmuch as the particular sources whence he expected to derive his information were not pointed out, the Court would not interfere. But here the defendant does point out specifically the particular sources of information, and he even gives the names of his witnesses. I think, therefore, that the rule should be made absolute, but on the terms of the defendant undertaking to admit the publication of the alleged libel; the costs of this application to be costs in the cause.

The other judges concurred.

Rule absolute (*a*).

It is not necessary, in an affidavit to postpone a trial on the absence of material witnesses, to *name* the witnesses.

(*a*) On the same day a similar application was made in another libel cause, (*Buckingham* v. *Banks*,) and for leave for the defendant to examine witnesses on interrogatories in *Upper Egypt*; and it being objected, that as the defendant did not specify by *name*, in his affidavit, the witnesses material and necessary to his defence, the Court ought not to postpone the trial;

The Court said, it was not usual, and certainly not requisite, to *name* the witnesses whom the party deemed necessary and proposed to examine.

Rule absolute.

The King v. Bennett.

Wednesday, July 7.

A defendant convicted of a misdemeanor and adjudged by this Court to pay a fine to the king, and to be imprisoned in the custody of the marshal for a term certain, and to remain in custody after the expiration of his imprisonment until the fine should be paid, was, after the expiration of his defined term of imprisonment and before the fine was paid, admitted to the rules for a term limited, in consequence of the dangerous state of his health.

THIS defendant had been convicted of a misdemeanor, and sentenced by the Court to be confined in the custody of the marshal of the Marshalsea of this Court, for twelve calendar months, and to pay to the king a fine of 1000*l.*, and ordered to remain in custody until the fine should be paid. The term of the defendant's imprisonment having expired, but he being unable to pay the fine,

Curwood now applied on his behalf, that he might be admitted to the privilege of the rules of the prison, until he should be enabled to pay the fine; and he submitted, that as the defendant was a debtor of our lord the king, he was

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in principle in the same situation, and was entitled to the like privilege, allowed to other debtors. There might be a distinction, perhaps, between a crown debtor in execution for penalties, and a person in execution and remaining in custody for non-payment of a fine imposed upon him as a punishment; but under the special circumstances disclosed in the affidavits now produced, he prayed that the defendant might be admitted to the rules. He produced the affidavits of the defendant and two physicians respectively, stating that the defendant was in an ill state of health, and that unless he was allowed air and exercise, his life would be in danger.

Notice of this application having been given to Mr. *Attorney-General*, and no opposition being made to it on the part of the crown,

ABBOTT, C. J. said, In order that we may not establish a precedent for holding that a person remaining in custody under circumstances similar to the present, is entitled to the privilege of the rules, we shall make a special order, and do now order accordingly, that the marshal be at liberty to allow the benefit of the rules to the party now applying until the fourth day of next Term, if he shall think fit. The rule will be drawn up upon reading the affidavits of the defendant, and of the physicians who depose to the state of his health.

A rule was accordingly drawn up in the terms dictated by the Court.

HERBERT and another, Executors, *v.* KEAL.

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Executors are bound to give a peremptory undertaking to proceed to trial, in like manner as other plaintiffs, but they are not liable to costs on discharging the rule.

ON shewing cause against a rule nisi for judgment as in case of a nonsuit for not proceeding to trial pursuant to notice, the question was, whether the plaintiffs, who sued as executors, could be compelled to give a peremptory undertaking to proceed to trial at a time stipulated; and

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The COURT said, they could not make any distinction in this respect between executors and other plaintiffs. They must proceed peremptorily, or submit to a stet processus, &c.

It was then submitted, that the rule could only be discharged with costs, inasmuch as the defendant had been obliged to come to the Court after repeated delays on the part of the plaintiffs; but

The COURT said, that the rule as to costs in the case of executors applied to motions for judgment as in case of a nonsuit, in like manner as if the cause had actually proceeded to trial and judgment.

Chitty, for the plaintiffs; *Abraham*, for the defendant.

Rule discharged, upon the plaintiffs undertaking to give a peremptory undertaking to try at the Sittings after this Term (a).

(a) See 14 *G*. 2. c. 17. Willes, 316. Barnes, 130. 2 H. Bl. 277. 7 Price, 709. Tidd, 8th ed. 823. 30. 2 Archbold's Prac. 214.

Wednesday, July 7.

The KING v. The SHERIFF of MIDDLESEX, in a cause of HALLIDAY v. LOCKE.

Where the defendant obtained two days further time for justifying bail, and it was ordered that in the meantime the plaintiff should be in the same situation as he might otherwise have been by the practice of the Court, and in the interval the plaintiff demanded a plea:—Held, that the justification of bail was not thereby waived.

CHITTY on a former day obtained a rule nisi for setting aside an attachment against the sheriff, with costs, for irregularity. Notice of justifying bail had been given by the defendant *Locke* for the 28th *June*. On that day the bail did not attend; but upon an affidavit being produced, the learned Judge presiding in the bail-court granted two days further time for justifying, and the usual rule was drawn up for that purpose; and it was thereby ordered, that in the meantime the plaintiff should be in the same situation as

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he might otherwise have been by the practice of the Court. On the following day the plaintiff's attorney demanded a plea, and the defendant not having justified his bail on the 30th *June*, the plaintiff proceeded by attachment against the sheriff. The ground urged for setting aside the attachment was, that the plaintiff's demand of plea was a waiver of the justification.

Reader shewed cause, and contended that the plaintiff's proceedings were perfectly regular. A demand of plea is no waiver of justification under the circumstances of this case. The plaintiff would not be in the same situation that he might otherwise have been by the practice of the Court, if he had not demanded his plea on the 29th. He demanded a plea de bene esse, in the expectation that the defendant would justify his bail on the 30th, and having failed so to do, the sheriff was liable to an attachment.

Chitty, in support of the rule. The plaintiff, by demanding a plea, admits that the defendant is in Court, and in a condition to plead, and therefore the justification of bail is waived. *Barnes*, 92. and *Imp*. 266.

Per Curiam.—The condition of giving further time to the defendant to justify his bail is, that the plaintiff shall not in the meantime be in a worse situation than he would have been had the bail justified in due time. His demanding a plea, therefore, is no waiver of the justification. If it were, the giving further time would be a mere trap to obtain an advantage, to which the defendant could not have been entitled.

Rule discharged.

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GENERAL RULES.

AFFIDAVITS.

TRINITY TERM, FIFTH GEO. IV. 1824.

IT IS ORDERED, that no affidavit shall hereafter be used in support of a motion for a new trial in any case, whether criminal or civil, unless such affidavit shall have been made before the expiration of the first four days of the Term following the trial, if the cause be tried in vacation; and before the expiration of the first four days after the return of the distringas, if the cause be tried in Term, without the special permission of the Court for that purpose.

SPECIAL JURIES.

IT IS ORDERED, that in all cases where a rule for a special jury shall have been obtained for the trial of any cause in the county of *Middlesex*, and notice for summoning the same shall be given, such notice, together with the distringas, shall be left at the office of the sheriff of the said county before seven o'clock in the evening next but one before the day on which such jury shall be required to attend, unless such jury shall be required to attend on a *Monday*, and then before seven in the evening of the preceding *Friday*; and that all notices of countermand for summoning special juries shall be left at the said office before twelve o'clock at noon of the day immediately preceding the day for which the jury was to have been summoned.

END OF TRINITY TERM.

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davit to hold to bail, described himself as of *Dorset Place, Clapham Road, Middlesex,* and his true residence was *Dorset Place, Clapham Road, Surrey,* the Court ordered the bail-bond to be cancelled, and a common appearance entered. *Collins* v. *Goodger,* 4 & 5 *G.* 4. 44

2. An affidavit of debt, stating that *A.* was indebted to *B.* for goods sold and delivered in *Holland,* and that the debt was assigned to *C.* according to the laws of *Holland;* concluding with a statement that the assignee of a debt may sue the debtor according to the laws of *Holland,* "as deponent is informed and believes;" is sufficient to hold the defendant to bail in this country. *Scuerhop* v. *Schmanuel,* 5 *G.* 4. 180

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2. An attorney has a lien upon deeds, papers and writings belonging to a bankrupt, not merely for his bill for business done before the bankruptcy, but for the costs of an action brought against him after the commission issued, to recover the amount of his bill, unless it appears that, as an attorney, he had improperly commenced the action for the purpose of increasing costs. *Lambert* v. *Buckmaster*, 4 & 5 *G*. 4. 125
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1. Where, by judge's order, a cause and all matters in difference between the testator of an executor and the defendant were referred to arbitration, and the arbitrator awarded that a sum certain was due to the defendant upon the balance of accounts, and directed the executor to pay the money out of assets on a given day, without determining whether in point of fact the executor had assets to pay the money on the day appointed:—Held, that the award was not void for uncertainty. *Love* v. *Honeybourne*, 5 G. 4. 814
2. Where, by the terms of an order of nisi prius referring matters in dispute to the award of an arbitrator, on the terms of the defendant paying the costs of the cause, and of the reference and award, and the plaintiff, after having accepted the costs of the reference and award, was dissatisfied with the award: Held, that he was precluded from impeaching it. *Kennard* v. *Harris*, 5 G. 4. 272
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2. Where an action was commenced in *June*, 1822, and after the defendant became bankrupt the plaintiff proceeded and signed interlocutory judgment, and issued a ca. sa. in *Michaelmas* term, 1823, to which non est inventus was returned, whereupon the plaintiff proceeded by sci. fa. against the bail, and signed judgment thereon on the 26th *February*, 1824: the Court refused to set aside the proceedings against the bail even upon payment of costs, though it was sworn that they knew nothing of the proceedings after declaration against the principal, or against themselves, until they received notice on the 27th *February* that they were fixed. *Swayne* v. *Bland*, 5 G. 4. 373
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4. After issue joined in assumpsit for goods sold, the plaintiff added a special count for not delivering a bill of exchange, and having recovered a general verdict:—Held, that the bail were discharged. *Thompson* v. *Macirone*, 5 *G.* 4. 619

5. The Court entered an exoneretur on the bail-piece after execution against the bail, where the defendant in the original action was rendered in due time, but no notice of the render had been given until the goods of the bail had been taken in execution. *Thorn* v. *Hutchinson*, 5 *G.* 4. 712

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BAILOR AND BAILEE.

Where *A.* hired a room in the house of *B.* at 2*s.* per week, for the purpose of depositing goods for safety, and kept the key of a padlock by which the room door was fastened, and the goods were stolen by one of *B.*'s family:—Held, that *B.* could not be sued as bailee for the value of the goods stolen. *Peers* v. *Sampson*, 5 *G.* 4. 636

BANKRUPT.

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1. Where *A.* became bail to the sheriff on a testatum capias against *B.* returnable the 13th, the 16th being the quarto die post, and the four days after the quarto die post expired on the 20th *April*, and *A.* became bankrupt on the 9th:—Held, that the bail-bond was forfeited on the quarto die post, the other four days being allowed merely ex gratiâ, and that the penalty of the bond was a debt provable under the commission, and was barred by the certificate. *Coulson* v. *Hammond*, 4 & 5 *G.* 4. 160

2. Where a country trader was in the habit of coming up occasionally to *London*, and staying a day or two at a friend's house, where he wrote his letters, and used to order goods to be sent to him there, and in the same street a creditor of his lived, and on a particular day he told his friend not to inform the creditor that he was in town, because the latter would be bothering him for his money; and shortly afterwards the creditor called at the house upon business, whereupon the bankrupt went into a back warehouse for ten minutes or a quarter of an hour, to avoid seeing the creditor:—Held, that this was a "beginning to keep house," within the meaning of 1 J. 1. c. 15. so as to support a commission of bankrupt. *Curteis* v. *Willes*, 5 *G.* 4. 224

3. Plaintiff recovered damages and costs against defendant in an action of trespass, and signed final judgment on the 29th *January*. On the 23d of that month defendant committed an act of bankruptcy, and a commission issued against him on the 31st of the same month, and on the 3d *May* he obtained his certificate:—Held, that the damages and costs were a bonâ

fide *debt* within the meaning of 46 *G*. 3. c. 135. s. 2. and provable under defendant's commission, and having been arrested on a ca. sa. for the damages and costs, the Court discharged him out of custody. *Robinson* v. *Vale*, 5 *G*. 4. 430

4. To an action for maliciously suing out a commission of bankrupt against plaintiff, the defendant pleaded, that plaintiff, being a dealer and chapman, and being indebted to the defendant in the sum of 100*l*., became and was a bankrupt within the meaning of the statutes concerning bankrupts, wherefore defendant sued out the commission in the declaration mentioned. The plaintiff replied, that the defendant, of his own wrong, &c., committed the grievances mentioned in the declaration. On demurrer that the plaintiff by this replication had attempted to put in issue three distinct allegations, *viz*. the trading, the bankruptcy, and the petitioning creditor's debt: Held, that the replication was sufficient, the plea of bankruptcy being pleaded only as matter of excuse. *O'Brien* v. *Saxon*, 5 *G*. 4. 579

5. Discharge under a *Scotch* sequestration is an effectual bar to an action for a debt contracted in *England* by a *Scotch* trader before the sequestration. *Sidaway* v. *Hay*, 5 *G*. 4. 658

BARGAIN AND SALE.

See SHIP, 2.——TROVER.——FRAUDS, STATUTE OF.

BARON AND FEME.

See ANNUITY.

1. By indenture, to which husband and wife were the first and second, and a trustee for the latter, the third parties, respectively, reciting that unhappy differences had arisen between the husband and wife, and that they had mutually agreed to live separate, the husband covenanted to pay an annuity of 80*l*. during so much of the wife's life as he should live, in full satisfaction of her support and maintenance, and of all alimony whatsoever, and that he would not at any time thereafter sue her for the restitution of conjugal rights; and the trustee covenanted that the wife should release her husband's real and personal estate from all claims for jointure, dower, or thirds, and that he would indemnify the husband for debts incurred by the wife after separation:—Held, that such indenture was valid in law, and that a plea by the husband "that the wife had instituted a suit in the ecclesiastical Court for restitution of conjugal rights, in which cause he had put in an allegation and certain exhibits, charging her with adultery, and that a decree of divorce from bed and board was thereupon pronounced by that Court," was no answer to an action by the trustee for arrears of the annuity. *Jee* v. *Thurlow*, 4 & 5 *G*. 4. 11

BASTARD.

See SETTLEMENT BY BIRTH.

BILL OF EXCHANGE.

See EVIDENCE.—USURY, 1, 2.
BAIL.

Where the drawer of a bill of exchange indorses it to a third person as a valid security, and whilst it is current, his declarations *afterwards*, that it was an accommodation bill, will not defeat the indorsee's right to sue the acceptor. *Shaw* v. *Broom*, 5 *G*. 4. 730

BISHOP.

See SIMONY.—PROHIBITION.

BLACK ACT.

See HUNDRED, 2.

BOND.

See ANNUITY.—TROVER.

1. To an action of debt on bond, conditioned for the payment of 500*l*. by two instalments, defendant pleaded " that he, by his agent *W*. made unlawful contracts for the purchase and sale of shares in the public funds; that the contracts were not performed; but *W*., as agent for defendant, voluntarily paid 500*l*. to compound the differences, against the form of the statute; that to secure to *W*. the repayment of that sum, defendant gave his promissory note to *W*., which *W*. indorsed to plaintiffs long after it had become due; that plaintiffs afterwards threatened to sue defendant on the note, and that defendant, in fear of that suit, and at the request of plaintiffs, gave the bond, which plaintiffs accepted in lieu of the note and the money thereby secured, they well knowing that the note had been given for the purpose and on the occasion in the plea mentioned." The evidence was that *W*. received the note as a security for money which he was at some future time to pay for stock-jobbing transactions; and that plaintiffs took the note after it was due, and had notice of the illegal consideration before the bond was given:—Held, first, that the evidence did not support the plea, which alleged that the note was given to secure the repayment of money already advanced by *W*.; and, second, that as the note was taken after it was due, and the bond after notice of the illegal consideration, they were both equally void, and no action could be maintained on the latter; but liberty was given to the defendant to amend his plea on payment of costs, and to the plaintiffs to reply de novo. *Amory* v. *Meryweather*, 4 & 5 *G*. 4. 86

BOROUGH.

See EXTORTION.—MANOR, 2.
MANDAMUS.

BRIGHTON.

See DUTIES.

BURGESSES.

See MANDAMUS.—CHARTER.

BUILDING ACT.

See CONVICTION, 5.

BY-LAW.

See DEPUTY.

A resident inhabitant of a town corporate has a right to inspect and take copies of a by-law of

the corporation, pending an action against him for a breach of the same, although he is not a corporator; and mandamus will lie for this purpose. *Harrison* v. *Williams*, 5 *G*. 4. 820

CARRIER.

See CONVICTION, 3, 4.

CASE.

ACTION.—ANCIENT LIGHTS, 2. BANKRUPT.—COPYRIGHT.—DISTURBANCE.—MALICIOUS ARREST.—SEDUCTION.

1. Where trustees under the general turnpike act, by improving the course of a public road, had effected a consequential, injury to a private individual, whose estate abutted on the road:—Held, that they were not liable to an action, it appearing that they had not exceeded the authority given them by the statute. *Bolton* v. *Crowther*, 5 *G*. 4. 195
2. Running water is originally publici juris, and an individual can only acquire a right to it by applying so much of it as he wants to a beneficial purpose, leaving the rest to others, who, if they acquire a right to it by subsequent appropriation, cannot lawfully be disturbed in the enjoyment of it. But where the gravamen of an action on the case for disturbing a water-course was, that defendant had erected a dam above plaintiff's premises, on the river *L*. and widened another dam, and thereby prevented the water from running in its usual course, and in its usual calm and smooth manner, to plaintiff's premises, and thereby the water ran in a different channel, and with greater violence, and injured the banks and premises of plaintiff, but without alleging that he had sustained an injury from the want of a sufficient quantity of water; and the jury having negatived any injury to the plaintiff from the causes assigned, but being of opinion that the defendant ought not to keep the water pent up in summer time:—Held, that the plaintiff was not entitled to a verdict. *Williams* v. *Morland*, 5 *G*. 4. 583

CERTIORARI.

1. Where a defendant had removed an indictment from the sessions into this court by certiorari, and was convicted, but died before he could be brought up for judgment:—Held, that his bail were liable to pay the taxed costs of the prosecution, under 5 *W*. and *M*. c. 11. s. 3. *Rex* v. *Turner*, 5 *G*. 4. 816
2. Certiorari issued to the Judge of an inferior jurisdiction to return the practice of his Court. *Williams* v. *Lord Bagot*, 5 *G*. 4. 315
3. Where a defendant, in an action brought in an inferior Court for *defamation*, after entering a common appearance, and suffering judgment by default, removed the proceedings by certiorari into this Court without entering into any recognizance: Held, that the case was within 51 *G*. 3. c. 124. s. 3. and the Court awarded a procedendo for the defendant's default in not entering into the recognizance thereby required, the damages being laid only at 13*l*. *Lee* v. *Goodlad*, 5 *G*. 4. 350

CERTIFICATE.

See EVIDENCE, 1—SHIP, 2.—COSTS, 3, 4.—BANKRUPT, 1, 2, 3.—SETTLEMENT BY CERTIFICATE.

CHARTER.

See DEPUTY.—MANDAMUS, 1. MANOR, 2.

Where the modern charter of a corporation, consisting of a mayor, eleven aldermen, eighteen assistants, and eighteen common council-men, after directing that the corporate officers should for ever *thereafter be nominated and chosen out of the free burgesses*, proceeded to nominate the first corporate officers, and amongst the common council-men was named one who was not at the time of his nomination *a free* burgess:—Held, that he was entitled, by virtue of his nomination, to all the privileges, and to exercise the office of a free burgess of the borough. *Rex* v. *Perkins*, 5 *G*. 4. 427

CHARTER PARTY.

See SHIP, 3.

In a charter party on the *St. P.* for a voyage from *G.* to bring home a cargo to *Europe*, it was stipulated that, in the event of the *non-arrival* at the same port of another ship called the *G.* (which had been chartered by the same parties, and was then at sea,) then the charter on the *G.* should be void to all intents and purposes whatsoever: — Held, that the word "non-arrival" could not be construed so as to defeat the purposes of the voyage for which the *G.* had been chartered, and her non-arrival for those purposes not being attributable to the fault of the charterers, the charter on the *St. P.* became void, and the charterers were not bound to provide her with a cargo. *Soames* v. *Lonergan*, 4 & 5 *G*. 4. 74

CHURCH.

See FALSE IMPRISONMENT.

CLERK.

See SIMONY.—PROHIBITION.

COLCHESTER.

See CHARTER.

COMMISSIONERS.

See COMMON, RIGHT OF.—MANOR, 2.—DUTIES.

COMMITMENT.

See CUSTODY, CHANGE OF.

COMMON, RIGHT OF.

Where commissioners under an inclosure act awarded, that certain persons, entitled to a right of common in certain commonable lands, "shall for ever hereafter use and enjoy the said commonable place as a common pasture, *exclusive of all others whatsoever*:—Held, that the right of the commoners was still subservient to the right of the lord to take stone, it appearing that both before and since the award, the lord had exercised that right; and that an action was not maintainable against his lessee, although the soil had latterly been subverted to an unusual extent. It seems, however, that if the lord wantonly and unnecessarily exer-

cises his rights to the injury of the commoners of pasture, he is liable to an action. *Place* v. *Jackson*, 5 *G*. 4. 318

COMPURGATORS.

See DEBT.

CONSPIRACY.

See EVIDENCE, 4.

CONSTABLE.

See FALSE IMPRISONMENT.

CONTRACT.

See SIMONY.—TROVER, 1.—DAMAGES, 1.—USURY, 1, 2. SETTLEMENT BY HIRING AND SERVICE, 3.

CONVICTION.

See CERTIORARI, 1.—JUSTICES.

1. The costs to be paid by offenders under the Stage Coach Act, 50 *G*. 3. c. 48., must be ascertained by the conviction, or it is bad. *Rex* v. *Payne*, 4 & 5 *G*. 4. 72
2. The 3 *G*. 4. c. 110. makes it an offence for any person to be found carrying and conveying, &c. uncustomed brandy, and "upon the oath of one or more credible witness or witnesses," the offender is liable to be sent on board a king's ship, if he is fit and able to serve in the navy, and if not, to pay a pecuniary penalty. Where a conviction stated that *R. A.* was duly convicted before the justice of having been found "carrying and conveying" brandy liable to seizure, without stating that he had been convicted of that offence "upon the oath of a credible witness:"—Held, that the conviction was bad, and the defendant was discharged. *Ex-parte Aldridge*, 4 & 5 *G*. 4. 83
3. The driver of a stage van, travelling to and from *London* to *York*, is a common carrier within the meaning of 3 *Car*. 1. c. 1. and subject to the penalties thereof, for travelling on *Sunday*. *Rex* v. *Middleton*, 5 *G*. 4. 824
4. A conviction on the 5 *Ann*. c. 14. s. 2. against a common carrier, for having, in that capacity, game in his possession, need not negative the defendant's qualification to kill game; neither is it necessary to aver, that he had the game in his possession "knowingly." *Rex* v. *Marsh*, 5 *G*. 4. 260
5. Where justices omitted to set out on the record of a conviction on the building act, the evidence adduced on the hearing of the information, as nearly as possible in the words used by each of the witnesses, in pursuance of the 3 *G*. 4. c. 23., a mandamus issued to compel them to do so. *In re Rix*, 5 *G*. 4. 352

CO-PARCENERS.

See MANOR.

COPYHOLD.

See MANOR.—MANDAMUS.

COPYRIGHT.

1. The privilege conferred by the copyright acts of this country do not extend to books printed abroad. *Clementi* v. *Walker*, 5 *G*. 4. 598
2. Where the author of a musical composition sold the right of publishing it to a music-seller

in *Paris*, in 1814, reserving to himself the right of publishing it in *England*, and in the same year, he sold the work to *A*. an *English* music-seller, by *parol*, who immediately published it; and in 1818, *B*, another *English* music seller, bought a *French* copy of the composition in the fair way of his trade, at *Paris*, and republished it here on his own account; and in 1822, the author executed a valid assignment of the copyright to *A*. in writing:—Held, that *A*. could not maintain an action against *B*. for piracy. *Clementi*, v. *Walker*, 5 *G*. 4. 598

CORPORATION.

See DEPUTY.—MANDAMUS.—BY-LAW.—CHARTER, 1.

COSTS.

See BOND, 1.—CONVICTION, 1.—ATTORNEY, 2.—PLEADING, 1.—SECURITY FOR COSTS.—EJECTMENT, 3.—HUNDRED, 1.—CERTIORARI, 1.—PRACTICE, 1.—HOLDING TO BAIL, 1.—NEW TRIAL, 1.—AWARD, 2.—SET OFF, 1.—BAIL, 2.—BANKRUPT, 3.—APPEAL.—ASSIGNEES.

1. Where, to an indictment at the assizes for a misdemeanor, defendants consented to plead guilty, upon an understanding that they were not to be brought up for judgment, and no stipulation having been then made by the prosecutor for the payment of his costs:—Held, that he was not afterwards entitled to a rule on the Crown side to have his costs taxed. *Rex* v. *Rawson*, 4 & 5 *G*. 4. 124

2. Where an inquisition of damages was excessive, and the Court granted a rule for setting it aside, leaving it to an arbitrator to say for what sum the verdict should stand (nothing being said at the time as to costs), and the arbitrator reduced the damages considerably: Held, that the plaintiff was not entitled to the costs of setting aside the inquisition. *Lewis* v. *Harris*, 4 & 5 *G*. 4. 129

3. A Judge's certificate that a trespass is wilful and malicious, to entitle a plaintiff to his full costs, under the 8 & 9 *W*. 3. c. 11. s. 4., need not be granted at the time of the trial in open Court, but may be granted at any time between verdict and final judgment. *Woolley* v. *Whitby*, 4 & 5 *G*. 4. 147

4. Under the stat. 22 & 23 *Car*. 2. c. 9., a Judge's certificate for costs in actions of assault and battery, may be granted at any time between verdict and final judgment. *Johnson* v. *Stanton*, 4 & 5 *G*. 3. 156

5. Where a defendant was arrested for a debt of 15*l*. and paid into Court 6*l*. which the plaintiff took out and dropped the action:—Held, that although the defendant had offered to pay the 6*l*. before action brought, he was not entitled to have his costs taxed under 43 *G*. 3. c. 46. s. 3. *Davey* v. *Renton*, 5 *G*. 4. 186

6. By a Judge's order the defendant was allowed to go to trial, upon payment of a certain sum of money, together with the costs of the cause up to the date of the order; and the defendant having recovered a verdict without previously complying with

the terms of the order:—Held, that the costs taxed in his favour on the postea could not be set off against the interlocutory costs, so as to deprive the plaintiff's attorney of his lien. *Aspinall* v. *Stamp*, 5 *G*. 4. 716

COUNSEL.

If the counsel for the defendant on the trial of an indictment for a misdemeanor opens new facts in his address to the jury, and afterwards declines calling witnesses to prove the facts so opened, the counsel for the prosecution is, notwithstanding, entitled to a general reply. *Rex* v. *Bignold*, 4 & 5 *G*. 4. 70

COUNTY CLERK.

See County Court.

COUNTY COURT.

The County Clerk of Middlesex is entitled to take the following fees upon the hearing and determination of suits in his court, viz. upon the appearance of both parties upon the first summons and determination of the cause, 3*s*. 1*d*.; upon an order nisi in consequence of the non-appearance of the defendant upon the first summons, 2*s*.; and upon execution on a judgment against the defendant, 3*s*. 4*d*.; which sums include the fees to the county clerk, bailiffs, and criers. *Rex* v. *The County Clerk of Middlesex*, 5 *G*. 4. 273

COVENANT.

See Baron & Feme.—Ship, 3.

1. Lime kilns, though erected for the purposes of trade, during the continuance of a lease by indenture, containing a *general* covenant to repair, cannot be removed by the tenant without a breach of such covenant. *Thresher* v. *The East London Water Works Company*, 4 & 5 *G*. 4. 62
2. Covenant, "not to let, set, assign, transfer, set over, *or otherwise part with, the premises demised, or the lease*," of a coffee-house, is not broken by proof of a deposit of the lease with the brewers of the lessee, as a security for beer supplied to the house. *Doe* v. *Hogg*, 5 *G*. 4. 226

CUSTODY, CHANGE OF.

A prisoner under criminal process in the House of Correction cannot be brought up by habeas corpus, for the purpose of being charged in the custody of the marshal upon a bailable writ, and recommitted to his former custody so charged. *Guthrie* v. *Ford*, 5 *G*. 4. 271

CUSTOM.

See Settlement by Certificate.—Trespass, 1.—Extortion.—Manor 2.

1. A custom "that all the tenants, resiants, and inhabitants of a manor, shall grind at the lord's mill all *their* corn and grain, as well growing within the manor as brought from other places, and spent ground in their houses," may be a good custom, but it shall not extend to restrain the inhabitants who do not grow corn and grain of their own, from using ground corn or flour, though it may not have been ground or grown within the manor. *Richardson* v. *Walker*, 5 *G*. 4. 498

2. By the custom of a manor, the tenants, resiants and inhabitants thereof were bound to grind all their corn, grain and malt, as well growing within the manor as brought from other places, and spent ground in their houses, at *two* ancient mills belonging to the lord, *or one of them*, at their own option; and the lord having pulled down one of the mills, so as to deprive the tenants, &c. of their option: Held, that the custom was suspended. *Richardson* v. *Capes*, 5 *G*. 4. 512

CUSTOMS.

See CONVICTION, 2.

DAMAGES.

See COSTS, 2.—SHIP, 2.—CERTIORARI, 3.—PROCEDENDO, 1.—BANKRUPT, 3.

Where a contract for delivering a quantity of bacon by a given time was broken:—Held, that the damages were to be estimated by the price of bacon, of the same description, at or about the time when the contract was broken, and not at the time when the damages were assessed. *Gainsford* v. *Carroll*, 4 & 5 *G*. 4. 161

DEBT.

See BANKRUPT, 1,2,3.—DUTIES.—OVERSEERS AND CHURCHWARDENS.

To debt on simple contract, the defendant pleaded "nil debet per legem," and applied to the Court to assign the necessary number of compurgators to wage his law, but the Court refused to interfere. *King* v. *Williams*, 4 & 5 *G*. 4. 3

DEFAMATION.

See CERTIORARI, 3.

DEMURRER.

See ABATEMENT, 1.

DEPUTY.

By charter, the corporation of *Gravesend* were to have a capital seneschal, or high steward, and a sub-seneschal, or under steward, by the latter of whom the judicial and ministerial functions of a recorder were to be performed, but no authority was given him to appoint a deputy, and although a by-law of the corporation required that the under-steward, *or his sufficient deputy*, should be attendant at every court, to discharge the duties of his office: Held, that the under-steward could not appoint a deputy *generally* to discharge all his ministerial duties. *Semble*, that he might appoint a deputy to do some particular ministerial act, with the assent of the corporation. *Rex* v. *The Mayor, &c. of Gravesend*, 4 & 5 *G*. 4. 117

DESCENT.

See ALIENAGE.

DEVISE.

1. Testator devises to his daughters, *J*. and *E*., "their heirs, executors, and administrators, equally between them, all and every his messuages, lands, tenements, and hereditaments, both freehold and leasehold, in &c., to have and to hold to the said *J*. and *E*., their heirs, executors, and administrators, equally:"—Held, that the testator, by this devise, passed all his interest in

the estates to his daughters in fee, to the exclusion of his right heirs. *Doe* v. *Sparkes*, 5 *G*. 4. 246

2. Devise "to my daughter, *M.G.*, all the houses, out-houses, gardens, and other property, which I hold under, &c. for 999 years. And I also give one half part of my books to my daughter *M.* aforesaid, the other half to my widow *S. G.*; to be equally divided by *T. S.* If my daughter *M.* should happen to die unmarried, it is my will then that *her part aforesaid* shall be equally divided amongst all my brothers and sisters, share and share alike, *by lot*. All the rest and remainder of my property I give and bequeath to *S. G.*, my widow." Testator's daughter died unmarried, under age, and intestate. The leasehold property consisted of four tenements with the appurtenances, and one garden. Testator had one brother and three sisters. *Query*, whether the gift over of the daughter's "part aforesaid," comprehended the whole of the property given to the daughter, or only the books:—Held, that it included both. *Doe* v. *Gell*, 5 *G*. 4. 387

3. Testator devises his estate to his son *G.* "to hold to him my said son *G.* for and during the term of his natural life; and from and after his decease, I give and devise the same estates unto all and every the child and children of my said son *G.* lawfully to be begotten, and their heirs for ever, to hold as tenants in common and not as joint tenants. But if my said son *G.* should die without issue, or leaving issue, and such child or children should die before attaining the age of 21 years, or without lawful issue, then I give and devise the same estates unto my son *T.* and my daughter *A.* and my son-in-law *D.* and their heirs for ever, to hold as tenants in common, and not as joint tenants." Upon testator's death, his son *G.* suffered a recovery, and died unmarried and without issue:—Held, that the devise over was a contingent remainder with a double aspect, and was defeated by the destruction of the particular estate by the recovery. *Doe* v. *Selby*, 5 *G*. 4. 108

DISTRESS.

See LANDLORD AND TENANT. ACTION.

DISTURBANCE.

See CASE.—FALSE IMPRISONMENT.

No action will lie for disturbing a rookery. *Hannam* v. *Mockett*, 5 *G*. 4. 518

DIVORCE.

See BARON AND FEME.

DOWER.

See SETTLEMENT BY ESTATE. BARON AND FEME.

DUTIES.

By an act for improving the town of *Brighton* and preserving the adjacent coast from the incursions of the sea, the commissioners therein named were empowered to collect any rate or duty which they should think fit to order, not exceeding the sum of 3*s.* *for every chaldron of coals* landed on the beach, or in any

other manner brought or delivered within the town. Where a declaration in debt, for duties under this statute, alleged, that defendant, on divers days and times between &c. brought and delivered within the town divers large quantities, in the whole amounting to a large quantity, to wit, 68 chaldrons and four bushels of coals, in quantities on each of the said days and times less than one chaldron: Held, that the duty attached, though the defendant did not bring into the town at any one time a quantity amounting to a chaldron: Held also, that plaintiff might take judgment for the 68 chaldrons, and enter a remittitur for the residue. *Mills* v. *Funnell*, 5 G. 4. 561

DYING DECLARATIONS.

See EVIDENCE, 3.

EAST INDIA COMPANY.

See SHIP.

ECCLESIASTICAL JURISDICTION.

See BARON AND FEME.—PROHIBITION.

EJECTMENT.

See DEVISE, 1.—COVENANT, 2. NOTICE TO QUIT, 1.

1. In ejectment, upon the forfeiture of a lease for non-payment of rent, where the proviso was, that if the rent was in arrear for 21 days, the lessor might re-enter, "although no formal or legal demand shall be made for payment thereof:" Held, that ejectment for non-payment of rent within the time stipulated might be maintained against the lessee without demanding the rent, or actually re-entering the premises. *Doe* v. *Masters*, 4 and 5 G. 4. 45
2. Although this case might not be strictly within the stat. 4 G. 2. c. 28. s. 204., yet the Court refused to relieve the tenant by staying proceedings, upon bringing the rent in arrear, and the costs of the ejectment, into court, *after trial*. *Id.* 50
3. Though the Court will in general stay the proceedings in a second ejectment upon the same title, until the costs of the first are paid, still, it seems, that if the verdict in the first was obtained by fraud and perjury, the Court will not restrain the party from proceeding until the costs are paid. *Doe* v. *Thomas*, 4 & 5 G. 4. 145
4. Judgment in ejectment set aside because signed too soon. *Doe* v. *Hedges*, 5 G. 4. 393

ELECTION.

See MANDAMUS.

ENTRY.

See EJECTMENT.

EQUITY.

See SETTLEMENT BY ESTATE.

ERROR.

See WRIT OF ERROR, 1.—INFERIOR JURISDICTION.

ESTATE.

See DEVISE, 1.—MANOR.—SETTLEMENT BY ESTATE, 1.—ALIENAGE.

EVIDENCE.

See Ancient Lights, 1—2.—Bankrupt, 1.—By Law.—Conviction, 4—5.—Copyright.—Counsel.—Covenant, 2.—Duties.—Extortion.—Guaranty.—Justices.—Landlord and Tenant.—Libel, 1—2—3.—Limitations, Statute of, 1.—Pleading, 1.—Postponing Trial.—Settlement by Apprenticeship.—Settlement by Certificate. Settlement by Order unappealed from.—Settlement by Tenement, 1.—Trespass, 1.—Trial.—Variance, 1.

1. Where *A.* & *B.* had dissolved partnership, and two days afterwards *A.* drew a bill in the names of the partnership, which was accepted and paid by *C.* without consideration; and *C.* afterwards brought assumpsit against *A.* & *B.* for money lent:—Held, that *A.*, who had become bankrupt and obtained his certificate, was a competent witness for *B.* to prove that the acceptance was for his (*A.*'s) own sole accommodation, inasmuch as *B.* was merely a surety within the meaning of the 49 *G.* 3. c. 121. s. 8. and might have proved under *A.*'s commission. *Moody* v. *King*, 4 & 5 *G.* 4. 30

2. In an action by the assignees of *A.*, against whom a commission was sued out upon the petition of the assignees of *B.*, and no notice being given to dispute the validity of the commission:—Held, upon 49 *G.* 3. c. 121. s. 10. that proof of the proceedings under *A.*'s commission was sufficient evidence of the petitioning creditor's debt, without going into any evidence of the validity of *B.*'s commission. *Skaife* v. *Howard*, 4 & 5 *G.* 4. 37

3. It is a general rule in criminal cases that dying declarations are admissible only where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declaration; therefore, where a defendant had been convicted of perjury, and had obtained a rule nisi for a new trial, pending which he shot the prosecutor, and on shewing cause against the rule for a new trial, an affidavit of the dying declaration of the prosecutor, relating to the transaction out of which the prosecution for perjury arose, was tendered in evidence:—Held, that it was inadmissible. *Rex* v. *Mead*, 4 & 5 *G.* 4. 120

4. A plaintiff convicted of a conspiracy, is not incompetent to make an affidavit to hold a defendant to bail. *Park* v. *Strockley*, 4 & 5 *G.* 4. 144

5. Where a trader, at the suggestion of his attorney, called a meeting of his creditors, to be held at a given time and place, and on the morning of that day went to the attorney's office, and inquired of him whether he could safely attend the meeting without being arrested for debt, and the attorney having advised him to remain at the office, until it was ascertained whether the creditors would engage to give him a safe-conduct; the trader remained at the office accordingly for upwards of two hours, to

avoid being arrested by some or one of his creditors, until after the attorney had attended at and returned from the meeting:—Held, that what passed between the attorney and the trader, was admissible in evidence, upon an issue whether the latter had committed an act of bankruptcy on that occasion. *Bramwell* v. *Lucas*, 5 *G*. 4. 367

EXECUTORS.

See AWARD.—PRACTICE, 1.

EXTORTION.

See COUNTY COURT.

Where the mayor of an ancient borough, in which he was also a justice of the peace, took a fee of 4s. from a publican resident within the borough, for renewing his annual license, and although it appeared that for 57 years a similar fee had been uniformly received by the mayor for the time being, from every publican within the borough applying to have his license:—Held, that such fee was illegal, and might be recovered back in assumpsit for money had and received, without notice of action. *Morgan* v. *Palmer*, 5 *G*. 4. 283

FALSE IMPRISONMENT.

To an action of assault and false imprisonment, a plea by a constable, that the plaintiff illegally, intentionally, and irreverently made a disturbance in church, whereby the performance of divine service was interrupted and disturbed: whereupon defendant gently laid hands upon him, took him out of church, and detained him in custody until the service was over; and it appearing in evidence that the alleged disturbance was in the plaintiff (an unauthorised person) having read aloud in church, between the communion service and the sermon, a notice of a vestry meeting:—Held, that the plea was no answer to the action under the 1 *W*. & *M*. c. 18. s. 18; for, though the constable might turn the plaintiff out of church, he had no right to detain him in custody. *Williams* v. *Glenister*, 5 *G*. 4. 217

FALSE RETURN.

See VARIANCE.

FEES.

See COUNTY COURT.—EXTORTION.—MANOR.

FELONY.

See BAILOR AND BAILEE.

FINE.

See MANOR.—RULES OF PRISON.

FIXTURES.

See COVENANT.

FOREIGN LAWS.

See AFFIDAVIT TO HOLD TO BAIL, 2.—AVERAGE, 1.

FOREIGN STATES.

See ALIENAGE.

FRAUDS, STATUTE OF.

See PARTNERS.

1. Sales of goods by auction are within the 17th section of the statute of frauds. *Kenworthy* v. *Schofield*, 5 *G*. 4. 556
2. Where, at a public auction of goods, the conditions of sale

were read by the auctioneer before the biddings commenced, but the printed catalogue did not refer to the conditions, nor were they attached to it, and the agent of the defendant was declared the highest bidder for a lot, and the auctioneer put down the price and the name of the agent opposite the lot in the sale catalogue:—Held, that this was not a sufficient memorandum in writing of the bargain to satisfy the statute of frauds; but if the conditions of sale had been annexed to the catalogue, the putting down the agent's name would have been sufficient to bind his principal. *Id.* 556

3. Where goods to the value of 144*l.* were made pursuant to order, but continued, by the desire of the vendee, upon the premises of the vendor, excepting a part, to the value of 2*l.* 10*s.* which the former took away:—Held, that there was no delivery and acceptance of the goods within the meaning of the 17th section of the statute of frauds. *Thompson* v. *Macirone*, 5 *G*. 4. 619

FRAUDULENT REMOVAL.

See LANDLORD AND TENANT.

GAME.

See CONVICTION, 4.

GRANT.

See ANCIENT LIGHTS, 1.

GUARANTY.

Where, on the trial of an action upon a guaranty for the payment of work done for a third person, the plaintiff at first shaped his case upon the guaranty, but afterwards resorted to the common counts, and made out the defendant's liability as a principal, and recovered a verdict on those counts:—Held, that the verdict could not be disturbed. *Semble*, however, that the bail would be discharged. *Edge* v. *Frost*, 5 G. 4. 243

HABEAS CORPUS.

See CUSTODY, CHANGE OF.—PROCEDENDO, 1.—SHERIFF, 2.

HAMLET.

See HUNDRED.

HEIRS.

See DEVISE, 1.—MANDAMUS.

HIGHWAY.

See CASE, 1.—TRESPASS, 1.

HOLDING TO BAIL.

See COSTS, 5.——INSOLVENT DEBTOR, 2.——MALICIOUS ARREST.—SHERIFF, 2.

1. Where an attorney arrested the defendant, and held him to bail for his bill of costs amounting to 15*l.*, and the costs were afterwards reduced by taxation to a sum less than 15*l.*, the Court refused to order the bail-bond to be delivered up to be cancelled. *Thwaites* v. *Piper*, 5 *G*. 4. 194

HOUSE OF CORRECTION.

See CUSTODY, CHANGE OF.—SETTLEMENT BY HIRING AND SERVICE.

HUNDRED.

1. Where the inhabitants of a *town*, not within a *hundred*, had incurred costs in defending actions

brought on 57 *G*. 3. c. 19. s. 38. for damages done by riotous assemblies:—Held, that mandamus would not lie to two Justices of the town, to make and levy a rate for paying the costs. *Rex* v. *The Justices of King's Lynn*, 5 *G*. 4. 778

2. To support an action upon the 9 *G*. 1. c. 22. s. 8. against the hundred, for the wilful and malicious destruction of stacks of corn by fire, it is sufficient to give such evidence as may reasonably induce the jury to believe that the fire was wilful and malicious. Where a declaration upon this act alleged the notice of the fire to have been given to the *parish*, instead of to the *town*, *village*, or *hamlet*, as required by the statute:—Held, that the objection was cured by the verdict. *Reed* v. *The Inhabitants of the hundred of Gainsbury*, 5 *G*. 4. 250

HUSBAND.

See Ship, 3.

INCLOSURE.

See Common, Right of.—Manor, 2.

INDENTURE.

See Settlement by Apprenticeship, 2.

INDICTMENT.

See Abatement.

INFANT.

See Pleading, 1.

INFERIOR JURISDICTION.

See Certiorari, 3.—Procedendo, 1.—Writ of Error, 1.

This Court will order an inferior Court to amend its record according to the *facts* of the case as they occurred below, after an imperfect record has been annexed to a writ of error brought in this Court upon the judgment. *Williams* v. *Lord Bagot*, 5 *G*. 4. 315

INQUISITION.

See Costs, 2.—Damages, 1.

INROLMENT.

See Annuity.

INSOLVENT DEBTOR.

See Security for Costs.

1. Where a defendant gave a promise to pay a debt as to which he had been discharged under an Insolvent act:—Held, that he could not be arrested and held to bail upon such promise. *Butt* v. *Vine*, 4 & 5 *G*. 4. 154

2. Where a defendant, upon his petition for relief under the insolvent act, had been adjudged to remain in custody for nine months, at the suit of his opposing creditor, *A*., who was not an arresting or detaining creditor, and the marshal discharged the defendant before the nine months were out:—Held, that he was liable to be arrested and held to bail at the suit of *A*. for the same debt. *Edwards* v. *Tucker*, 5 *G*. 4. 216

3. Where a defendant was ordered by the Insolvent Debtors' Court to remain in custody at the suit of certain creditors by name, until sixteen months had expired, and being found at large within six months:—Held, under 3 *G*. 4. c. 123. that any of his scheduled creditors, though not named in the order, might arrest

him, and cause him to be confined until the sixteen months were expired. *Phillips* v. *Whitmore*, 5 *G.* 4. 347

4. An order for the discharge of an insolvent debtor under the small debts act, 48 *G.* 3. c. 122. is absolute in the first instance, after due notice of the application being given to the plaintiff or his attorney. *Davies* v. *Rogers*, 5 *G.* 4. 361

INSURANCE.

See Average, 1.

Where a vessel was so damaged by a sea peril, that in order to render her seaworthy it would cost as much to repair her as she was originally worth, and the captain sold her to a purchaser who partially repaired her, and sent her upon a voyage which she never completed, in consequence of her infirmity:—Held, first, that the underwriters were liable as for a total loss, though the vessel remained in specie at the time she was sold; and second, that notice of abandonment was unnecessary to entitle the owner to recover. *Cambridge* v. *Anderton*, 5 *G.* 4. 203

INTEREST.

See Usury, 1—2.

INTENDMENT.

See Settlement by Certificate.

JOINTURE.

See Baron and Feme.

JUDGE.

See Costs, 3—4.

JUDGMENT.

See Costs, 1—3—4.——Ejectment, 4.—Pleading, 1.——Practice, 3.—Procedendo, 1.—Writ of Error, 1.

JURISDICTION.

See Mandamus.

JUSTICES.

See Conviction, 1. — Extortion.—Libel, 3.—Mandamus.— Settlement by Apprenticeship, 2. — Settlement by Tenement.

1. After issue joined, and notice of trial given in an action against a magistrate for an act done in his magisterial capacity, he may withdraw his plea, pay money into court, and plead de novo. *Nestor* v. *Newcome*, 5 *G.* 4. 776

2. Where magistrates first took the examination of witnesses, not on oath, in support of a conviction, and afterwards swore them to the truth of their evidence, the court expressed its disapprobation of the practice. *The King* v. *Kiddy*, 5 *G.* 4. 734

LANDLORD AND TENANT.

See Action.—Ejectment, 1, 2.

1. The statute 11 *G.* 2. c. 19. applies to all cases where a landlord is, by the conduct of his tenant in removing goods from premises for which rent is due, turned over to the barren right of bringing an action for his rent. Where a tenant openly, and in the face of day, and with notice to his landlord, removed his goods without leaving sufficient on the premises to satisfy the rent then due, and the land-

lord followed and distrained the goods:—Held, that although the removal might not be *clandestine*, yet as it was *fraudulent* (which was a question for the jury), the landlord was justified under the statute. *Opperman* v. *Smith*, 4 & 5 *G*. 4. 33

2. Defendant hired of plaintiff apartments in his dwelling-house at a fixed rent, payable half-yearly, and entered into possession at *Michaelmas*, 1822. At *Lady-day*, 1823, he paid one half-year's rent, and at *Midsummer* following gave up possession, without having given any notice to quit; but at *Michaelmas* in the same year, he paid another half-year's rent. At *Lady-day*, 1824, plaintiff demanded a third half-year's rent, which defendant refused to pay. In an action of use and occupation for that half-year's rent:—Held, that a tenancy from year to year could not be inferred from these facts, and therefore that the action was not maintainable. *Wilson* v. *Abbott*, 5 *G*. 4. 693

LEASE.

See COVENANT, 1, 2.

LESSOR AND LESSEE.

See COMMON, RIGHT OF.—EJECTMENT, 1, 2.

LIBEL.

See POSTPONING TRIAL.—TRIAL.

1. In an action by an attorney for a libel, the declaration averred, that the libel was "of and concerning him generally," *and* "of and concerning him in his business and profession of an attorney:"—Held, that this was a divisible allegation, and that though the plaintiff could not prove he was a certificated or practising attorney at the time the libel was published, yet he was entitled to maintain the action for the libel on his character generally. *Lewis* v. *Walter*, 5 *G*. 4. 810

2. Where, to a declaration for a libel imputing to the plaintiff barbarous cruelty to his horse, the defendant pleaded pleas of justification; first, that the libel was true in all its particulars, and second, that it was true in substance and effect; and the jury found that the first plea was true, with the exception of two statements containing particulars of aggravated cruelty to the horse, and that the second was true in substance and effect, and gave a shilling damages, subject to the opinion of the Court as to the propriety of their verdict:—Held, that their verdict was right. *Weaver* v. *Lloyd*, 5 *G*. 4. 230

3. A plea, stating that libellous matter complained of "is true in substance and effect," means that it is true in every material particular. *Id*. *ib*.

4. In an action for a libel, the declaration stated, that plaintiff was an attorney, and had been employed by the parishioners of the parish of *St. M.* as vestry clerk; that while he was such vestry clerk, certain prosecutions were preferred against one *M.* for certain misdemeanours, and that *in furtherance of such proceedings, and to bring the same to a successful issue*, cer-

tain sums of money belonging to the parishioners were appropriated and applied to the discharge of the expenses and law charges incurred on account of the said proceedings; yet defendant, intending to injure plaintiff in his profession of an attorney, and to cause him to be esteemed a fraudulent practiser in his said profession, and in his office as vestry clerk, and to be a person unfit to be trusted therein, and to deprive him of the same, and to cause it to be suspected that plaintiff had fraudulently appropriated money belonging to the parish, falsely and maliciously published of and concerning plaintiff, and of and concerning his conduct in his office of vestry clerk, *and of and concerning the matters aforesaid*, the libel. When the libel was produced at the trial, the imputation appeared to be, that plaintiff had appropriated money belonging to the parishioners in discharge of the expenses of the prosecution after they had terminated:—Held, not a material variance, for the character of the libel was not altered, the misconduct imputed to plaintiff being the same, whether the money was so applied *before* or *after* the termination of the prosecution, and the averment that the libel was published *of and concerning the matters aforesaid,* not making it necessary to prove literally that the libel did relate to all the matters previously stated:—Held, also, that other libels published by plaintiff of defendant, not relating precisely to the same subject, could not be received in evidence, either in bar of the action or mitigation of damages. *May* v. *Brown*, 5 *G*. 4. 670

5. Where, to a declaration for a libel in a newspaper, defendants pleaded, first, that the libellous matter was a true and correct account of a statement made by *A*. & *B*. before a magistrate; and second, that the facts therein stated were true; and the jury found for the defendants on the first plea, and for the plaintiff on the second:—Held, that the plaintiff was entitled to judgment, non obstante veredicto, on the first plea, on the following grounds: 1. The statement, though correct, did not relate to a matter of which the magistrate had cognizance. 2. The defendants had printed and published that which would not have been actionable as oral slander, and consequently were not protected by giving the names of the authors at the time of the publication. And 3. Supposing the matter actionable as oral slander, the defendants had not by their plea offered themselves as witnesses to prove the words against the authors. *M'Gregor* v. *Thwaites*, 5 *G*. 4. 695

LIEN.

See Attorney, 2.—Set off, 1.

LIGHTS.

See Ancient Lights, 1, 2.

LIMITATIONS, STATUTE OF.

1. Where, upon demand made of payment of two promissory

notes over due ten years, the defendant said, "I cannot afford to pay my new debts, much less my old ones:"—Held, that the jury were warranted in negativing this as evidence of a subsisting debt to take the case out of the statute of limitations. *Knott* v. *Farren*, 5 *G*. 4. 179

2. Paying money into Court upon assumpsit for goods sold and delivered, does not deprive the defendant of the benefit of the statute of limitations as to the residue of plaintiff's demand. *Long* v. *Greville*, 5 *G*. 4. 632

LORD OF MANOR.

See Common, Right of.—Custom, 1—2.— Mandamus.—Manor, 2.

MALICIOUS ARREST.

See Arrest.

Where *A*. arrested *B*. upon the advice of his special pleader that he had a good cause of action, but afterwards, upon being ruled to declare, discontinued proceedings, and *B*. brought an action for a malicious arrest without any reasonable or probable cause:—Held, that the "reasonableness or probability of the cause" was a mixed question of law and fact for the jury to decide; and that they were rightly told by the Judge at Nisi Prius, that if they believed the defendant to have acted bonâ fide upon the advice he had received, he was entitled to a verdict; otherwise they ought to find for the plaintiff. *Ravenga* v. *Mackintosh*, 5 *G*. 4. 187

MALICIOUS INJURY.

See Hundred, 2.

MANDAMUS.

See By-Law.—Conviction, 4, 5.—Manor, 2.

1. Mandamus will not lie to compel a corporation to elect members of an indefinite body; therefore, where a charter authorized the mayor and recorder, or their respective deputies, and the rest of the aldermen of a borough for the time being, or the greater part of them, from time to time, and at all times thereafter, as often and when to them should seem fit and necessary, to nominate, chuse, and prefer so many and such persons to be free burgesses of the borough, as they pleased; and to those free burgesses so to be chosen, to administer an oath for their fidelity to the borough, the Court refused to grant a mandamus to compel the mayor and aldermen to proceed to the election of free burgesses, or to hold a meeting for the purpose of considering the propriety of proceeding to such an election, in order to fill up vacancies in the aldermanic body, and the then existing body of free burgesses, respectively. *Rex* v. *The Mayor, &c. of Fowey*, 4 & 5 *G*. 4. 132

2. Mandamus refused to command justices to rehear an application for an alehouse license, which they had refused, though it was suggested that their refusal proceeded from a mistaken view of their jurisdiction. *The King* v. *Farringdon Without*, 5 *G*. 4. 735

3. Mandamus does not lie to the mayor and aldermen of a borough, requiring them to assemble for the purpose of considering the propriety of removing non-resident members of their body, no serious injury or inconvenience to the inhabitants being suggested as resulting from such non-residence. *The King* v. *The Mayor of Portsmouth*, 5 G. 4. 767
4. Where a person claiming as heir-at-law of the tenant last seised of a copyhold, was refused admission by the lord, and a mandamus issued, but the lord, in his return thereto, did not deny the heirship, except argumentatively, the Court ordered a peremptory mandamus to go. *Rex* v. *The Brewer's Company*, 5 G. 4. 492

MANOR.

See Common, Right of.—Custom, 1, 2.—Mandamus.

1. Tenants in co-parcenery of a copyhold estate are in law but one heir; and it seems that they are entitled to admittance upon payment of one fine to the lord, and one set of fees to the steward of the manor. *Rex* v. *The Lord of the Manor of Bonsall*, 5 G. 4. 825
2. The bailiff and burgesses of an ancient borough had been time immemorially lords of the manor, and owners of the Guildhall within the borough, and by a charter of *P.* & *M.* power was granted to them to hold manor-courts in the Guildhall twice in every year, as of ancient time, and until 1810 such courts had been time immemorially held. In that year commissioners, under an inclosure act, awarded to Lord *H.* all the said manor, with the rights, members, courts, view of frank-pledge, *excepting to the bailiffs and burgesses the Guildhall*, &c.: — Held, that this exception did not exclude the new lord's right to hold his manor-courts in the Guildhall. *Rex* v. *The Bailiffs, &c. of Ilchester*, 5 G. 4. 324

MARRIAGE SETTLEMENT.

See Annuity.

MARSHAL.

See Custody, Change of.—Rules of Prison.

MEMORANDA.

See pp. 1. 177. 433.

MILL.

See Custom, 1, 2.

MINING.

See Trespass, 1.

MISDEMEANOUR.

See Costs, 1.—Counsel.

MONITION.

See Prohibition.

MORTGAGOR AND MORTGAGEE.

See Settlement by Estate, 1.

NEW TRIAL.

1. After plea in abatement found against a defendant, the Court will not grant a new trial, even upon payment of costs. *Shaw* v. *Hislop*, 5 G. 4. 241

NOTICE OF APPEAL.

See Appeal, 1, 2, 3.

NOTICE OF BAIL.

See Bail, 1.—Sheriff.

NOTICE TO QUIT.

A notice dated 27th, and served on the 28th of *September*, requiring a tenant to quit "at *Lady-day* next, or at the end of his current year," must be understood to mean a six months' and not a two days' notice to quit. *Doe* v. *Culliford*, 5 *G*. 4. 248

NOTICE OF RENDER.

See Bail, 3.

NOTICE OF TRIAL.

See Justice, 1.—Security for Costs.—Trial.

NUDUM PACTUM.

See Bond, 1.—Ship, 3.—Simony.—Usury, 1, 2.

OATH.

See Justices.

OCCUPIERS.

See Poor's Rate, 1.

OVERSEERS.

1. A formal demand is necessary before an action can be maintained against overseers for the surplus arising from a distress for poor's rates, under 27 *G*. 2. c. 20. s. 2.; and a plea of tender, which is found not to cover the plaintiff's demand, will not cure the objection. *Simpson* v. *Routh*, 5 *G*. 4. 181

OVERSEERS & CHURCHWARDENS.

See Appeal, 2, 3.—Poor.—Settlement by Apprenticeship, 2.—Settlement by Certificate.

An overseer supplying coals to the poor of his parish in the name of another person, but without any view to his *own profit*, is not liable to the penalties of 55 *G*. 3. c. 137. s. 6. *Skinner* v. *Buckee*, 5 *G*. 4. 628

PARTNERS.

See Evidence.

A. is indebted to *B*. and Co. for goods sold, and upon being released from his liability, assigns to the latter a debt which is due to him from *C*. and Co.; notice of the assignment is given to a partner in the house of *C*. and Co. who, *by parol*, promises in the name of the firm to pay the debt to *B*. and Co. out of the partnership funds:—Held, in an action by *B*. and Co. against *C*. and Co. for money had and received, first, that the promise was not within the statute of frauds; and second, that a promise by one partner was sufficient to bind all, although, as to some of the members, the partnership had been dissolved before the promise was given. *Lacy* v. *M'Neile*, 4 & 5 *G*. 4. 7.

PAYING MONEY INTO COURT.

See Costs, 5.—Justice, 1.—Limitations, Statute of.

PEERAGE.

See Abatement.

PENALTIES.

See OVERSEERS AND CHURCH-WARDENS.

PERJURY.

See COUNSEL.—EVIDENCE, 3.

PIRACY.

See COPYRIGHT.

PLEADING.

See ABATEMENT, 1.—BAIL.—BANKRUPT.—BOND, 1.—CASE.—CERTIORARI, 3.—COPYRIGHT.—DEBT.—DUTIES.—FALSE IMPRISONMENT.—GUARANTY.—HUNDRED, 2.—LIBEL, 1, 2, 3.—PROCEDENDO, 1.—PROMISSORY NOTE, 1.—SEDUCTION.—SHIP, 2.—TRESPASS, 1.—VARIANCE, 1.

1. After issue joined in assumpsit on a promissory note, plaintiff being ruled to enter the issue, entered a plea of *not guilty*, instead of *non assumpsit*, whereupon defendant signed judgment of non pros; but the Court set it aside without costs. *Aaron* v. *Chaundry*, 4 & 5 *G*. 4. 41
2. Where goods were ordered by one of two chapel-wardens, for the use of the church:—Held, that the warden giving the order might be sued separately, without joining his brother officer. *Shaw* v. *Hislop*, 5 *G*. 4. 241
3. Replication to a plea of infancy, that the promise to pay was made by defendant after he came of age, is not sustained by proof of a promise to pay *after* action commenced. *Thornton* v. *Illingworth*, 5 *G*. 4. 545

PLEDGE.

See COVENANT, 2.—PRINCIPAL AND AGENT.—TROVER.

POOR.

See OVERSEERS AND CHURCH-WARDENS.

If a pauper, who has the means of paying his rent and sustaining himself and family by the sale of his goods, applies to the parish for relief, and the overseers (without fraud on their part) are compelled by an order of Justices to relieve him, he is actually chargeable and removeable if he has not acquired a settlement. *Rex* v. *Ampthill*, 5 *G*. 4. 447

POOR'S RATE.

See APPEAL, 1, 2, 3.—OVERSEERS, 1.

A poor's rate, without giving a specification of the property for which the party is rated, is bad; therefore, where, under the head "Occupiers," the names only of the parties rated were given, with the rates and assessments opposite their names respectively:—Held, insufficient. *Rex* v. *The Aire and Calder Navigation*, 5 *G*. 4. 253

PORTSMOUTH.

See MANDAMUS.

POSTPONING TRIAL.

See TRIAL.

It is not necessary, in an affidavit to postpone a trial on the absence of material witnesses, to *name* the witnesses. *Buckingham* v. *Banks*, 5 *G*. 4. 833

PRACTICE.

See ABATEMENT.—AFFIDAVIT TO HOLD TO BAIL.—APPEAL.—ATTORNEY, 1—3.—BAIL, 1, 2, 3.—BANKRUPT, 1, 3.—BOND, 1.—CERTIORARI, 2.—COSTS, 2, 3, 4, 5.—COUNSEL.—CUSTODY, CHANGE OF.—DAMAGES, 1.—DEBT.—EJECTMENT, 1, 2, 3, 4.—EVIDENCE, 4.—INSOLVENT DEBTOR, 4.—JUSTICE, 1.—NEW TRIAL, 1.—POSTPONING TRIAL.—PROCESS.—SHERIFF, 2, 3.—TRIAL.—WARRANT OF ATTORNEY.—WRIT OF ERROR.

1. Executors are bound to give a peremptory undertaking to proceed to trial, in like manner as other plaintiffs, but they are not liable to costs on discharging the rule. *Herbert* v. *Keal*, 5 *G*. 4. 834
2. If a defendant, at the time he is served with the copy of non-bailable process, demands to see the original, and is refused, the service is irregular. *Thomas* v. *Pearce*, 5 *G*. 4. 317
3. Upon essoign declarations the plaintiff cannot sign judgment for want of a plea, until the *afternoon* of the 5th day after the rule to plead is served. *Duncan* v. *Carlton*, 5 *G*. 4. 391

PRINCIPAL AND AGENT.

See ANCIENT LIGHTS, 2.—BOND, 1.—FRAUDS, STATUTE OF, 2.—SHIP, 3.—TROVER.

1. An agent cannot sell the goods of his principal without the authority of his principal for that purpose; but an authority to sell may be implied from circumstances. *Dyer* v. *Pearson*, 5 *G*. 4. 648
2. Where a *London* agent was employed by his principal in the country to import goods from abroad, and send them to their destination; and by the bill of lading, the goods were deliverable *to order or assigns*, and indorsed in *blank* by the shipper, and the agent after being allowed to retain possession of the bill of lading for five months, sold the goods without any authority for that purpose:—Held, that it was a question for the jury, whether the principal had not by his conduct enabled his agent to hold himself out to the world as a person having authority to sell, and thereby convey a title to the vendee. *Id.* 648

PRISONER.

See RULES OF PRISON.

PROCEDENDO.

See CERTIORARI, 3.

Where a plaintiff, in an inferior jurisdiction, brought an action for 8*l*. 17*s*. 3*d*., but laid his damages in the declaration at 20*l*., and the defendant after interlocutory judgment signed against him removed the cause into this Court by habeas corpus cum causâ, without entering into the recognizances required by the 19 G. 3. c. 70. s. 6, the Court refused a procedendo. *Attenborough* v. *Hardy*, 5 *G*. 4. 362

PROCESS.

1. By the practice of this Court

a defendant served with a copy of non-bailable process by original, has eight days from the quarto die post, or appearance day after return of the process, to enter an appearance. *Hunter* v. *Simpson*, 5 *G*. 4. 713

2. The affidavit to set aside the service of process in a wrong county, must *in terms* state that the place of service is not on the confines of the county into which the process originally issued. *Storer* v. *Rayson*. 5 *G*. 4. 739

PROHIBITION.

Monition does not lie for recovering a curate's salary assigned to him by the bishop without the consent of a rector who *resides* on his benefice, and is capable of discharging his duties generally, but wants the assistance of a curate. *The King* v. *The Bishop of Peterborough*, 5 *G*. 4. 720

PROMISSORY NOTE.

See BOND, 1.—PLEADING, 1.

Declaration on a promissory note, in general terms stating the promise by the defendant to pay the money sought to be recovered, is sufficient to sustain the action, though the note when produced shews it was given to pay the debt and costs of an action against a third person. *Coombs* v. *Ingram*, 5 *G*. 4. 211

PROMOTIONS.

See p. 1.—177.—433.

PRUSSIA.

See TROVER.

RATE.

See DUTIES.—HUNDRED, 1.—POOR'S RATE, 1.

RECOGNIZANCE.

See CERTIORARI, 1, 3.—PROCEDENDO.

RECORD.

See CONVICTION, 5.—INFERIOR JURISDICTION.—VARIANCE.

REGISTER.

See SHIP, 1, 2.

RELEASE.

See ACTION.—BARON AND FEME.

RELIEF.

See POOR.

REMITTITUR.

See DUTIES.

REMOVAL.

See POOR.—SETTLEMENT BY TENEMENT.

RENDER.

See BAIL, 3.

RENT.

See EJECTMENT, 1, 2.—LANDLORD AND TENANT.—POOR.—SETTLEMENT BY ESTATE, 1.—SETTLEMENT BY TENEMENT.

RESIDENCE.

See MANDAMUS.

ROOKERY.

See DISTURBANCE.

RULES OF COURT.

See AFFIDAVIT AND SPECIAL JURIES, p. 836.

RULES OF PRISON.

A defendant convicted of a misdemeanor, and adjudged by this Court to pay a fine to the king, and to be imprisoned in the custody of the marshal for a term certain, and to remain in custody after the expiration of his imprisonment until the fine should be paid, was, after the expiration of his defined term of imprisonment, and before the fine was paid, admitted to the rules for a term limited, in consequence of the dangerous state of his health. *Rex* v. *Bennett*, 5 *G*. 4. 832

RUSSIA.

See Average.

SALE.

See Principal and Agent.—Ship.

SCOTLAND.

See Bankrupt, 2.

SECURITY FOR COSTS.

Security for costs required of a plaintiff who had taken the benefit of an Insolvent Act, after issue joined, but before notice of trial given. *Heaford* v. *M'Knight*, 4 & 5 *G*. 4. 81

SEDUCTION.

Where a declaration for seducing plaintiff's daughter was framed in trespass, but omitted the words "with force and arms:"—Held, that the verdict cured the objection. *Parker* v. *Bailey*, 5 *G*. 4. 215

SEQUESTRATION.

See Bankrupt, 2.

SESSIONS.

See Appeal, 1.—Settlement by Apprenticeship.—Settlement by Order unappealed from.—Settlement by Tenement, 2.

SETTLEMENT, *By Apprenticeship*.

1. Where an apprentice served his master for six years and nine months in the parish of I. under indentures which expired at *Midsummer-day*, and then went into the parish of D. and hired himself for a month to another master at weekly wages, to which service the first master gave consent; and at the end of that month, the pauper entered into a fresh agreement with the second master at the like wages, and continued to serve under that agreement until the 7th *June*, when he was called out to serve in the local militia, which he did for a fortnight, and returned to his second master on the 21st *June*, and made a new agreement to serve him as before at sixpence a day, and while in that service he slept from the 21st to the 24th of *June*, inclusive, in the parish of *I.*:—Held, that whether the service with the second master during the remainder of the term was with the consent of the first, or not, still, the pauper's sleeping for the last three nights in *I.* settled him in that parish, though the first master did not know of his sleeping there. *Rex* v. *The Inhabitants of Iddesleigh*, 5 *G*. 4. 332
2. Where in the absence of the usual proof in support of a settlement by apprenticeship, it appeared that the pauper,

when a boy, had lived for three years with his master, and then ran away; that twenty years since, a fire happened in the apartment in which the pauper's father lived, and destroyed every thing he had; that the father and mother of the pauper were both dead; that the pauper's master and the wife of the latter were also dead; that the master had left no property at his decease, and that no relatives of his were to be found; that a fellow-apprentice of the pauper had seen in his master's hand an indenture, which he understood to be the indenture of apprenticeship of the pauper; and that after the pauper had left his master's service he married, and the parish in which he was supposed to have served as an apprentice relieved his wife by receiving her into the workhouse:—Held, that this was sufficient evidence to warrant the sessions in presuming a legal binding and serving as an apprentice, so as to confer a settlement. *Rex* v. *St. Mary-le-bone*, 5 *G*. 4. 475

Where, pursuant to an order of *county* justices, overseers of a *county* parish bound one of their paupers apprentice to a master residing in a *borough* within the same county, having justices with exclusive jurisdiction therein, *and gave no notice of such binding to the overseers of the borough parish:* — Held, that the indentures were void by 56 *G*. 3. c. 139. and that a service under them gained the pauper no settlement; *Abbott*, C. J. dissentiente. *The King* v. *Newark-upon-Trent*, 5 *G*. 4. 745

SETTLEMENT, *By Birth*.

A bastard child, born in an extra-parochial place, does not acquire its mother's settlement.—*Rex* v. *St. Nicholas, Leicester*, 5 *G*. 4. 462

SETTLEMENT, *By Certificate*.

1. Where a parish certificate was granted by two persons, who described themselves on the face of it to be "the *only* churchwarden, and the *only* overseer of the poor of the parish:"—Held, after a lapse of sixty-three years, in the absence of evidence to the contrary, that the Court would intend, first, that the parish had by custom but one churchwarden; and second, that there had been originally two overseers, but that one had died, and consequently that the certificate was valid, as having been granted by a majority of the existing body of overseers within the meaning of the Certificate Act, 8 & 9 *W*. 3. c. 30. *Rex* v. *Catesby*, 5 *G*. 4. 434

SETTLEMENT, *By Estate*.

1. Where a widow was entitled to dower (which was unassigned) upon her husband's estate which had been mortgaged by him for a thousand years, and after receiving her dower upon one half-year's rent, from the mortgagee in possession, she became chargeable to the parish in which the property was situated before she had resided forty days:—Held, that as the dower had not been assigned, she had not such an interest in the parish as to render her irremoveable from what could be called

her own. Rex v. *the Inhabitants of Northweald Bassett*, 5 *G.* 4. 276

2. Where a pauper contracted in writing for the purchase of two cottages and gardens at the price of 70*l*. and paid 10*l*. on account at the date of the agreement, but never afterwards paid the remainder of the purchase money:—Held, that he had not such an equitable estate as to render him irremoveable from the parish in which the property was situated. *Rex* v. *Woolpit*, 5 *G.* 4. 456

SETTLEMENT, *By Hiring and Service.*

1. Where a nephew hired himself to his uncle for three years, at one shilling per day, when he had work for him to do, and when he had not work for him he was not to be paid, but was to be at liberty to get work from other people, and there was no proof of a service for the whole of any one year:—Held, that no settlement was gained as a yearly hired servant. *Rex* v. *The Inhabitants of Polesworth*, 5 *G.* 4. 528

2. Where a pauper was hired for three years at 20*l*. a year in the capacity of looker, his master telling him at the time the contract was entered into, that he did not think he should have full employment for him; and he served him for three years, during which time he did other work for his master, who paid him for it extra by the job, and he also worked for another master as looker when his leisure suited:—Held, that the relation of master and servant did not subsist between the parties so as to confer a settlement on the pauper. *Rex* v. *The Inhabitants of Lydd*, 5 *G.* 4. 295

3. Where a servant under a yearly hiring served for eleven months and two days, and was then committed to, and imprisoned in the House of Correction under 20 *Geo.* 2. c. 19. for misbehaviour, at the instance of the master:—Held, that the commitment and imprisonment were no dissolution of the contract, or such an interruption of the service as to prevent a settlement, although the servant received no wages for the time he was in custody. *Rex* v. *The Inhabitants of Hallow*, 5 *G.* 4. 299

4. A mistress hired a servant from *Shrove Tuesday* until *Old Michaelmas-day* following, and 3 days before the latter day asked her to "stay again;" to which the servant replied, she had no objection, if they could agree about wages. They agreed for 3*l*. 10*s*. and one shilling earnest was paid, but nothing was then said as to the time the service was to continue. A fortnight before *Old Michaelmas*, the mistress said to her, "I have hired you, but mentioned no time; remember you are hired for fifty-one weeks:" to which the servant replied, "very well." The servant lived with her mistress for a year under this agreement. She had three days' holiday at *Christmas*, and four other days at different times afterwards, and at the end of the year received her wages:—Held, that this was a yearly hiring